Supreme Court, U.S.
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85-1054

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION, *et al.*,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
and INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT BEFORE JUDGMENT

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Union, *et al.*

Date: December 18, 1985

QUESTIONS PRESENTED *

1. Did the District Court err in concluding that an order of the Interstate Commerce Commission authorizing the grant of trackage rights made it illegal for rail labor to obtain a voice in the crew selection process which, the court determined, had been precluded by the Commission's order?

2. Did the District Court err in concluding that it had the jurisdiction, notwithstanding the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, to enjoin a strike by which rail labor sought to obtain a result which the District Court believed was precluded by an Order of the Interstate Commerce Commission?

3. If it is assumed *arguendo* that the District Court had the jurisdiction to enjoin a strike, did Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, preclude such an injunction where the railroad refused to bargain, supposedly because an order of the Interstate Commerce Commission precluded the relief which rail labor was seeking?

4. Does the injunction in this case violate the Thirteenth Amendment to the Constitution of the United States, Section 2, Tenth of the Railway Labor Act, 45 U.S.C. § 152, Tenth, and Section 20 of the Clayton Anti-Trust Act, 29 U.S.C. § 52, because it prohibits rail employees from refusing to work for respondent Missouri Pacific Railroad?

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* Petitioners in this case include the United Transportation Union and the following individuals who were named as defendants in their capacities as union representatives in the suit by respondent Missouri Pacific Railroad: I. Newcomb and R. D. Hogan (General Chairmen); K. R. Guethle (First Vice Chairman); W. J. Shelton, R. L. Helms, T. K. Arthur, R. W. Bretch, R. P. Shocklee, B. J. Bennett, J. E. Queathem, and K. M. Danneman (Local Chairmen).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT BEFORE JUDGMENT

Petitioners United Transportation Union [hereinafter, "UTU"], *et al.*,[1] respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals to review before judgment the case presently pending in that court of appeals in 8th Cir. No. 84-1465, which is an appeal from the decision, judgment and permanent injunction of the United States District Court for the Eastern District of Missouri in *Missouri Pacific R.R. v. UTU,* E.D. Mo. Civil Action No. 83-771C(1).

OPINIONS BELOW

Since this is a request for a writ of certiorari before judgment, there is no opinion or order of the Eighth Circuit in

[1] The petitioners in this case are listed in footnote * on page i, *supra.*

this case. The decision, permanent injunction and judgment of the District Court on appeal, were filed on March 30, 1984, and are not reported; they are reproduced as Appendices B, D and E, respectively, to this Petition. The District Court issued an earlier decision on March 1, 1984, in support of several of its rulings which it made final on March 30, 1984; that decision is reproduced as Appendix C to this Petition and is reported at 580 F.Supp. 1490.

JURISDICTION

This Court has the jurisdiction by virtue of 28 U.S.C. § 1254(1) to review this case before judgment by the Court of Appeals. Petitioners UTU, *et al.*, filed a timely notice of appeal to the court of appeals on April 10, 1984, from the permanent injunction and judgment of the district court issued March 30, 1984, thereby invoking the appellate court's jurisdiction under 28 U.S.C. § 1291. This case has been fully briefed in the court of appeals and was argued on January 14, 1985. Nevertheless, this petition is timely since the judgment of the court of appeals has not yet been issued. 28 U.S.C. § 2101(e).

STATEMENT OF THE CASE

This petition for a writ of certiorari before judgment is presented by petitioner UTU as a companion case to its cross-petition for a writ of certiorari in Supreme Court No. 85-983 by which petitioner has asked this Court to review the decision by the United States Court of Appeals for the District of Columbia Circuit in *Brotherhood of Locomotive Engineers v. ICC* [*hereinafter, "BLE v. ICC"*], 761 F.2d 714 (D.C.Cir. 1985). That cross-petition was filed in response to separate petitions for writs of certiorari to review the District of Columbia Circuit's decision by the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] in No. 85-792 and by the Missouri-

Kansas-Texas Railroad Company [hereinafter, "MKT"] in No. 85-793.

Petitioners have filed this petition for a writ of certiorari to the Eighth Circuit to place before this Court issues which necessarily flow from an acceptance of the ICC's position in No. 85-792 that its orders supersede the Railway Labor Act, 45 U.S.C. § 151, *et seq.* If the ICC's belief is sustained then the next issues which must be addressed are whether a strike in response to the carriers' unilateral action is illegal, and, if so, whether the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, deprives federal courts of all equity jurisdiction to enjoin such a strike. Since the district court in the Eighth Circuit case reached its decision by relying upon the ICC orders subsequently vacated by the District of Columbia Circuit in *BLE v. ICC, supra,* and since it is important to the entire rail industry (management and employees alike) and to the public that these companion issues be resolved quickly, petitioner UTU respectfully submits that a writ of certiorari before judgment is appropriate in this case, if this Court grants the petitions in Nos. 85-792, 85-793 and 85-983. *See, New Haven Inclusion Cases,* 399 U.S. 392, 418 (1970); *United States v. United Mine Workers,* 330 U.S. 258, 269 (1947); *Railroad Retirement Board v. Alton R.R.,* 295 U.S. 330, 344 (1935).

A. Preliminary Statement

This case, like its companion case in *BLE v. ICC, supra,* stems from conflicting interpretations which both rail labor and the railroads have given to the effect of the conditions which the ICC imposed on its order approving the Pacific Rail System, Inc.'s control over the Missouri Pacific, Union Pacific and Western Pacific railroads. *See, Union Pacific Corp.—Control,* 366 I.C.C. 459 (1982), *aff'd in part, remanded in part sub nom., Southern Pacific Transportation Co. v. ICC,* 736 F.2d 708 (D.C. Cir. 1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 1171 (1985). In that order, the ICC imposed the requirement that if the carriers formed the Pacific Rail System, they must grant to

the MKT, among others, the right to operate over approximately 200 miles of Missouri Pacific tracks from the MKT's most northern point—Kansas City, Missouri—to both Lincoln and Omaha, Nebraska, and then into Council Bluffs, Iowa on the Union Pacific's tracks. 366 I.C.C. at 570. The ICC also conditioned its control approval, and its grant of trackage rights, by imposing the requirement that all of the involved carriers agree to comply with various provisions designed to protect the interests of rail employees who might be affected by any action taken to modify rail operations as a result of the ICC approvals of the financial transactions at issue. 366 I.C.C. at 654, ¶ 17, 19. The work stoppage at issue in this case is the result of the Missouri Pacific's and MKT's insistence that the trackage rights authorization superseded the Railway Labor Act, the contractual rights of Missouri Pacific employees represented by the UTU, and the employee protective provisions imposed by the ICC.

Article 1, Section 2 of the two different employee protective arrangements imposed in this case,[2] provides that:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

E.g., Norfolk & Western Ry.—Trackage Rights, supra, note 2, 354 I.C.C. at 610. The employee protective arrangements

[2] The Commission imposed the *New York Dock* conditions upon the applicants for the protection of Missouri Pacific employees, among others, and it imposed the *Norfolk & Western* conditions upon the carriers involved in the trackage right transactions. *See*, UTU Cross-Petition in No. 85-983 at 4-5. The principal difference between the two sets of conditions, as explained in note 3, *infra*, is the notice provision.

imposed upon the MKT's trackage rights provided in Article 1, Section 4 that:

> When the railroads contemplate a transaction [which Art. 1, § 1(a) defines as an "acquisition by a railroad of trackage rights over . . . any railroad line or lines owned or operated by any other railroad"], they shall give at least twenty (20) days' written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroads and by sending registered mail notices to the representatives of such interested employees. . . .
>
> At the request of either railroad or representatives of such interested employees, negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix shall commence immediately and continue for not more than twenty (20) days from the date of notice. *Each transaction which will result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4.* . . .

Norfolk & Western Ry.—Trackage Rights, supra, note 2, 354 I.C.C. at 610-11 (emphasis added).[3]

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[3] The *New York Dock* conditions' notice provision is different from the *Norfolk & Western's* in two respects. First, the *New York Dock* conditions require 90 days advance notice and, second, *New York Dock* provides that: "No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered." *New York Dock* conditions, Art. 1, § 4(b), 360 I.C.C. at 85. *See, Railway Labor Executives' Assoc. v. United States,* 675 F.2d 1248, 1253 (D.C. Cir. 1982).

Shortly after the ICC served its order in late October 1982, the MKT, Missouri Pacific and Union Pacific railroads entered into an agreement dated November 9, 1982, which reflected their agreement in principle on the terms and conditions for the grant of trackage rights to the MKT. Certified Record in court of appeals [hereinafter, "C.R."] at 24. That interim agreement provided that: "The parties will enter into a standard form trackage rights agreement to implement MKT's trackage rights." *Id.* In March 1983, the carriers filed their formal trackage rights agreement with the ICC and in Section 5(B) of that agreement stated that: "Tenant [MKT] shall, with its own employees and at its sole cost and expense, operate its trains, locomotives and cars over the Joint Track, subject, however, to such rules, timetables, regulations and orders as Pacific [*i.e.*, Missouri Pacific and Union Pacific] may issue from time to time." *Id.*

MKT's crew selection provision was consistent with the position which that railroad had taken before the ICC in support of its request for trackage rights conditions, for in its evidence which it presented to show the feasibility of its proposed conditions, the MKT assumed that it would use its own employees to operate its trains over Missouri Pacific and Union Pacific tracks. *See*, MKT Petition in No. 85-793 at 3.[4]

On December 22, 1982, the Pacific Rail System consummated its control over the various railroads and on January 6, 1983, the MKT began operating over Missouri Pacific tracks using its own employees to run those trains. C.R. at No. 24; Appendix at 6c.

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[4] Respondent MKT has alleged throughout this case that rail labor did not challenge its proposal to use its own employees while the trackage rights issue was before the ICC. *E.g.*, MKT Petition in No. 85-793 at 3. That allegation is incorrect, for rail labor asked the ICC to impose employee protective conditions if the Commission approved the trackage rights request; the employee protective conditions proposed by rail labor contained the same preservation of rights, notice and negotiation provisions as subsequently imposed in the *New York Dock* conditions. *See*, Certified Index before D.C. Cir. in *BLE v. ICC*, *supra*, at F.D. No. 30,000 (Sub-No. 20, *et al.*) at 4.

B. Impact of Trackage Rights Operations On Missouri Pacific Employees

Shortly before the MKT began operating over Missouri Pacific lines, the Missouri Pacific sent a letter to the UTU General Chairmen on that railroad dated December 31, 1982, advising them that the MKT "will commence operations between Kansas City, Missouri, and Omaha and Lincoln, Nebraska, on January 3, 1983." C.R. No. 24. Petitioner Newcomb, one of the UTU General Chairmen on the Missouri Pacific, responded in a letter dated January 4, 1983, stating that:

> The . . . [MKT] has no terminals north of Kansas City, Missouri and prior to this time has not handled any service beyond that point. This service has traditionally been handled by the employees we represent on the Missouri Pacific (Proper) Railroad, and it is our position that any and all service operated northward on Missouri Pacific tracks out of Kansas City, Missouri be protected [*i.e.*, performed] by Missouri Pacific (Proper) road crews. Request is hereby made that such service be protected as indicated above.

Appendix at 5c-6c. The Missouri Pacific did not respond in writing to that letter, but met with the UTU on several occasions between January 4, 1983 and March 7, 1983 to discuss the UTU's concerns. *See*, Appendix at 8c; C.R. at 85. In the meantime, however, the MKT commenced its operations over the Missouri Pacific on January 6, 1983. *Id.* at 6c.

During the conferences which resulted from the January 4, 1983 letter, the UTU asked the Missouri Pacific to negotiate with it "regarding (1) the transfers to MKT of the right to operate over MoPac tracks to perform work previously performed by MoPac operating employees, and (2) the effects of such a transfer of operating rights on MoPac employees represented by UTU." C.R. at 85. Respondent Missouri Pacific, however, refused to negotiate on either issue because, in

its opinion, the ICC's order required it to grant trackage rights to MKT and it had no right to negotiate about either the selection of forces to staff the MKT operations or the impact of that transfer on Missouri Pacific-UTU employees. *Id.*

More than ten (10) days after the last conference was held, and after neither party requested the services of the National Mediation Board (*see,* 45 U.S.C. § 156), petitioners UTU, *et al.*, informed the Missouri Pacific as follows in a mailgram dated March 28, 1983 (C.R. at 11):

> The undersigned representing conductors, road brakemen, yardmen, firemen, hostlers, and hostler helpers on the Missouri Pacific (Proper) have exhausted our patience and goodwill in attempting to have your stop the use of MKT employees manning freight trains over Missouri Pacific lines between Kansas City and Omaha. This will serve as notice that if arrangements are not made to halt this trespass on our collectively bargained agreements and our seniority by non-Missouri Pacific employees, the employees under the jurisdiction of our Committees will peacefully withdraw from service on those parts of the Missouri Pacific Railroad under our jurisdiction at 12:01 a.m. April the 4th 1983.

In response to that message, the Missouri Pacific filed a complaint against petitioners on March 30, 1983, in the United States District Court for the Eastern District of Missouri requesting that the Court enjoin petitioners and UTU members from striking or otherwise failing to report for work. C.R. at 1-6. The court granted the Missouri Pacific a Temporary Restraining Order on March 30, 1983, and that interlocutory order was extended by consent until February 7, 1984, when, after the parties had filed cross motions for summary judgment, the court issued a preliminary injunction.[5] That injunction was made permanent on March 30, 1984. Appendix at 1d.

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[5] Respondent MKT moved to intervene as a plaintiff in April 1983 and that request was granted on May 6, 1983. Petitioner UTU filed a counterclaim on May 20, 1983, seeking to enforce the Railway Labor Act and Article 1, Section 4 of the employee protective conditions. C.R. at 31-19.

Another labor organization, the Brotherhood of Locomotive Engineers, which represented the Engineers on the Missouri Pacific, filed a petition with the ICC to clarify the effect of the ICC's order. That petition, along with the subsequent requests by the Engineers and the UTU to reconsider, led to the ICC orders which were vacated by the District of Columbia Circuit in *BLE v. ICC, supra.* However, those orders were relied upon by the district court in this case to deny petitioners' counterclaim and to grant injunctive relief to respondents Missouri Pacific and MKT.[6]

C. Rulings By District Court

On March 1, 1984, the district court issued a Memorandum which set forth its rulings which were subsequently incorporated into the permanent injunction. In that Memorandum, the court first examined and rejected petitioners arguments that the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, deprived the federal courts of jurisdiction to grant injunctive relief to restrain the work stoppage threatened by the UTU. Although it recognized that there was a factual dispute over whether the controversy between the Missouri Pacific and the UTU could be characterized as a "major" or a "minor" dispute,[7] the court resolved that factual dispute on the summary judgment motions because it believed that the UTU's mailgram

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[6] On October 19, 1983, petitioner UTU asked the district court to refer two issues raised by the Counterclaim to the ICC, but the Court denied that motion because, in the Court's opinion, the ICC's decision of October 19, 1983, had resolved both issues. *See,* Appexndix at 31c-34c. Petitioner agreed that one issue—whether the ICC intended its 1982 Order to supersede Railway Labor Act rights—had been decided by the ICC's October 1983 Order, but the UTU asserted that the second issue—whether the employee protective provisions required MKT and the Missouri Pacific to give advance notice to Missouri Pacific-UTU employees, and to negotiate an agreement with those employees—had not been resolved. Petitioner UTU raised the failure to refer the second issue on its appeal to the Eighth Circuit, but it is not asking this Court to resolve that referral issue by this Petition.

[7] Under the Railway Labor Act, a "major" dispute is one involving changes to existing rates of pay, rules or working conditions, whereas a "minor" dispute is one dealing with interpretations of existing agreements to

(footnote continued)

was the best evidence of the controversy between the parties. That mailgram, the court found, revealed that the UTU was concerned that its current agreements and seniority rights were being violated by the MKT's operations; in the court's opinion, this finding of fact led to the conclusion that the controversy was a minor dispute because "the dispute is arguably and reasonably susceptible to resolution by reference to the contracts between the parties." Appendix at 17c. Consequently, according to the district court, the Norris-LaGuardia Act did not bar injunctive relief. *Id.* at 16c-17c.

Petitioners argument that Sections 2, Seventh and 6 of the Railway Labor Act, 45 U.S.C. § 152, Seventh and 156, prohibited unilateral changes in existing working conditions and thus removed this controversy from the "minor" dispute category, was rejected by the court. Relying upon the ICC's orders denying the Engineers' and UTU's petitions seeking to clarify the 1982 Order, the court concluded that: "[T]he ICC's approval of the trackage rights arrangement exempts MOPAC from its duty under § 152, Seventh and § 156, at least with respect to the crewing provisions of the trackage rights agreement." *Id.* at 19c. That exemption, the court stated, came from 49 U.S.C. § 11341(a) which was "self-executing" and, since the ICC had "twice made it clear [in the two orders which were subsequently vacated by the *BLE v. ICC*] that MOPAC and [MKT] . . . are exempt from any requirements of the RLA concerning the crew selection clause in the approved trackage rights agreement" (Appendix at 19c), there was no need to make a *de novo* determination of necessity here, as petitioner had asked be done. *Id.* at 20c. According to the district court: "To the extent the UTU challenges this action of the ICC, it may not do so in this forum. The United States Court of

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(footnote continues)

ascertain their meaning. This distinction is important because minor disputes not settled after conferences may be resolved only by adjustment boards, whereas a party may not be compelled to arbitrate a major dispute. *See, Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711 (1945); 45 U.S.C. § 157, First.

Appeals are vested with exclusive jurisdiction to determine the validity of orders of the ICC." *Id.* The court then added that, "to the extent that *Texas* [*& New Orleans R.R. v. Brotherhood of Railroad Trainmen,* 307 F.2d 151 (5th Cir. 1962), *cert. denied,* 371 U.S. 952 (1963)] . . . stands for the proposition that § 11341(a) cannot operate to relieve a carrier of its obligations under the RLA, this Court respectfully rejects that proposition." *Id.*

Petitioners UTU, *et al.*, then argued that even if this dispute could be termed a "minor" dispute, the Norris-LaGuardia Act should not be displaced by Section 3 of the Railway Labor Act, 45 U.S.C. § 153. Petitioners asserted that if respondent Missouri Pacific has been relieved of its obligations under the Railway Labor Act to honor its contracts with the UTU, there is no contract interpretation issue to be submitted to an adjustment board and, thus, there is no justification for accommodating the Railway Labor Act to the Norris-LaGuardia Act under *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957). This argument was also rejected by the district court because:

> The [*Chicago River*] rationale is not absent, because the ICA provides "a process for a final decision," . . . and here the ICC rendered a final decision as to the validity of KATY's use of KATY employees to operate its trackage rights. In [*Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963)] . . . , the Eighth Circuit made it clear that the ICC has jurisdiction to determine labor disputes, whether "minor" or "major", in connection with its power to approve mergers and consolidations. . . . Here the ICC resolved the crew selection question against UTU, and to that extent the jurisdiction of the [Adjustment Boards] . . . is displaced. Just as the NLGA is excepted to enforce the labor

> jurisdiction of the [Adjustment Boards] . . . , in this case the NLGA is excepted to enforce the labor jurisdictions of the ICC.

Appendix at 21c (footnote omitted).

Although it concluded that the controversy was a "minor" dispute, the court added that:

> This Court finds it necessary to rest the Court's conclusion that the NLGA does not prevent an injunction against UTU's threatened strike from issuing, upon an alternative basis: Even if this is a "minor" dispute, MOPAC was exempted from any RLA duty to negotiate over the selection of crews and the NLGA must give way to protect the integrity of the jurisdiction and orders of the ICC under the ICA.

Appendix at 21c. In reaching that conclusion, the court acknowledged that its ruling was contrary to the Fifth Circuit's decision in *Texas & New Orleans, supra.* Nevertheless, the court stated that it "disagree[d] with the result reached in *Texas & New Orleans Railway Co.*" (Appendix at 25c) because "it is the opinion of this Court that the applicability of the NLGA must be displaced by the power of the ICC over transactions like the one here, in order to avoid consequences which Congress intended to prevent." *Id.* at 26c.

Finally, the district court observed that there was "*dicta* in various Supreme Court decisions [which] indicates that exceptions to the prohibitions of the NLGA will be found only where necessary to accommodate other Congressional objectives embodied in so-called 'labor legislation'." Appendix at 28c. Relying upon the assertion that "the ICC has jurisdiction over labor disputes in connection with consolidation proceedings," the court concluded that: "Here, the NLGA must be accommodated to the ICA in order to preserve the obvious

purpose of giving the ICC jurisdiction over railroad consolidation proceedings." *Id.*[8]

After that decision was issued,[9] the parties conferred as required by the court's order (Appendix at 35c-36c) and presented the court with executed stipulations and a Joint Statement which stated that, in light of the court's conclusions of law, a trial was unnecessary. Petitioners UTU, *et al.*, noted in the Joint Statement that although there was a factual dispute over whether the strike threat was premised in part on a major or a minor dispute, petitioners recognized that a favorable finding on that factual dispute would not result in a judgment in their favor because of the court's alternative conclusion that the Norris-LaGuardia Act must be accommodated to the Interstate Commerce Act, regardless of whether the dispute is major or minor. Joint Statement at 2-3.

Petitioners then asked the court to modify the injunction it was planning to issue to clarify the scope of the injunction and to eliminate any restraint upon individual employees. While the court granted the first request, it rejected the second which was premised on the Thirteenth Amendment to the Constitution of the United States and on Section 2, Tenth of the Railway Labor Act, 45 U.S.C. § 152, Tenth, which provides in pertinent part that: "[N]o court [shall] issue any process to compel the performance by an individual employee of such labor or service, without his consent." According to the district court, "the analysis which this court utilized to find that the ICC exempted plaintiffs [Missouri Pacific and MKT] from the requirements of the RLA applies here to exempt the [carriers from the provisions of Section 2, Tenth quoted above] . . . ."

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[8] The court also rejected petitioners' argument that Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, prohibited an injunction. Since the ICC "conclusively determined the dispute in the case at bar" (Appendix at 29c), Missouri Pacific had no obligation to negotiate and, thus, Section 8 did not bar an injunction.

[9] Petitioners appealed from that preliminary injunction order to the Eighth Circuit, but moved to dismiss that appeal after the district court issued its permanent injunction.

Appendix at 3b. Petitioners' Thirteenth Amendment argument was rejected because: "The injunction herein does not compel any employee to work against his will, nor does it prohibit any employee from voluntarily quitting. The injunction only prohibits work stoppages arising out of matters in dispute in this litigation." *id.* The court then issued an injunction which permanently enjoined UTU members on the Missouri Pacific from, among other acts, "failing or refusing to report for work in accordance with" the agreements on that carrier. Appendix at 2d.

Petitioners filed a timely notice of appeal to the Eighth Circuit; that appeal has been fully briefed, and was argued on January 14, 1985. Shortly after the District of Columbia Circuit issued its decsion in *BLE v. ICC*, the Commission sought leave to intervene in the Eighth Circuit case to explain why that court should not accept the *BLE* decision. On June 21, 1985, the court granted the ICC's request to intervene. Because of the relationship of this case to the decision in *BLE v. ICC, supra,* petitioners are asking this Court to issue a writ of certiorari to the Eighth Circuit to review this case, if this Court grants the requests for a writ of certiorari to review the decision in *BLE v. ICC.*

REASONS FOR GRANTING THE WRIT

I. This Petition Before Judgment Raises Issues Which Are Correlative To The Issues Raised By the Petitions To Review The Decision In *BLE v. ICC* And Are Important To The Orderly Administration Of The Interstate Commerce Act And The Railway Labor Act

Respondents ICC, MKT and Missouri Pacific have all asked this Court to accept for review the District of Columbia Circuit's decsion in *BLE v. ICC* because, in their opinion, that decision will be used by rail labor to block consolidations and other financial transactions which the ICC has found to be in

the public interest. *E.g.*, ICC Petition in No. 85-792 at 16. Indeed, the Association of American Railroads [hereinafter, "AAR"] has filed a brief as an *Amicus Curiae* urging that the *BLE v. ICC* decision be reviewed because, in its opinion, "[t]he role of the [Railway Labor Act] . . . in disputes arising out of carrier efforts to implement ICC-approved rail transactions presents the most pressing labor issue in the rail industry today." AAR Br. at 17. While rail labor agrees that the *BLE v. ICC* case should be reviewed by this Court (*see*, UTU Cross-Petition in No. 85-983 at 16), Petitioners UTU, *et al.*, respectfully submit that a full resolution of the problems perceived by respondents and by the AAR cannot be achieved unless this Court also reviews the Eighth Circuit case along with the *BLE v. ICC* decision.

As their pleadings to this Court make clear, respondents and the AAR are asking this Court to declare upon its review of the *BLE v. ICC* case that rail labor does not have a right to negotiate or to use economic self-help to protect their employment interests once the ICC has issued an order permitting rail carriers to consolidate, merge, or take other financial actions. Such a far reaching declaration, however, does not necessarily flow from a review of the District of Columbia Circuit's decision because that case, even as viewed by rail labor's cross petitions, does not address all of the questions arising out of labor's constitutionally grounded right to associate together and to use their collective economic powers to protect their interests. *See, NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *American Federation of Labor v. Swing*, 312 U.S. 321 (1941).

While the *BLE v. ICC* case as framed by rail labor does address the crucial and pivotal issue of whether the Interstate Commerce Act can be viewed as relieving railroads of Railway Labor Act or contractual obligations to their employees, an unfavorable resolution of that issue for rail labor leads into, but does not address, either rail labor's natural reaction to such an abrogation of rights—*i.e.*, a strike—or the railroads' natural response to such a strike—an injunction request.

Before respondents and the AAR may state legitimately that rail labor can be enjoined from striking over a railroad's abrogation of contractual or Railway Labor Act rights of employees because of an ICC order, the railroads have to establish three points. First, they have to show that the Interstate Commerce Act supersedes the Railway Labor Act and contractual rights of employees; that question is raised by the *BLE v. ICC* case which the entire rail industry is urging this Court to review. Second, the railroads have to establish that such a strike is prohibited by some legal obligation imposed upon employees (*but see*, Section 20 of the Clayton Anti-Trust Act, 29 U.S.C. § 52); the *BLE v. ICC* case does not address that issue. And third, the railroads have to establish that some Act of Congress restores to federal courts the jurisdiction to enjoin strikes which the Norris-LaGuardia Act has withdrawn. *But see, Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Assoc.*, 457 U.S. 702, 719 (1982); *Order of Railroad Telegraphers v. Chicago & North Western R.R.*, 362 U.S. 330, 335-36 (1960); *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963). This third issue is also not presented by the *BLE v. ICC* case. However, the second and third issues are presented by the case pending before the Eighth Circuit.

Petitioners UTU, *et al.*, agree with respondents that it is extremely important to all connected with the rail industry—management, employees, shippers, the ICC and the public—that this Court resolve the current dispute over the impact of an ICC order on employment rights of rail employees. However, petitioners submit that in resolving this dispute, this Court should have before it a sufficient basis upon which to resolve the entire dispute and not just that half presented by the *BLE v. ICC* case.

If respondents are correct in believing that the Commission's merger orders supersede inconsistent Railway Labor Act

rights and contracts, and that a railroad may modify existing agreements unilaterally by simply including the proposed modifications in its application before the ICC, then it is inevitable that rail employees will be forced to use their collective economic powers to compel rail management to honor their employment rights. *E.g., United States v. Lowden*, 308 U.S. 225, 234-36 (1939). Indeed, the threat of such strikes has already occurred in this case and in the case cited by respondent ICC in its petition (ICC Petition at 17 n.13) involving the transfer of the properties of the Chicago, Milwaukee, St. Paul & Pacific Railroad to the Soo Line Railroad under both Section 77 of the Bankruptcy Act, 11 U.S.C. § 205 (repealed for subsequent cases) and Section 5(b) of the Milwaukee Railroad Restructuring Act, 45 U.S.C. § 904(b). Consequently, a full and final resolution of the current dispute over the effect of an ICC merger order on rail employees must include not only the issues raised by the *BLE v. ICC* case, but also the issues raised by petitioners' appeal presently pending before the Eighth Circuit—*i.e.*, whether a carrier's exemption from the Railway Labor Act has the effect of relieving rail labor from the restraints which that Act places on labor's right to strike, and whether the Norris-LaGuardia Act must be, and can be, accommodated to the Interstate Commerce Act.

Unfortunately, if this petition for a writ of certiorari before judgment is not granted, those questions will not be resolved completely by the Eighth Circuit for several reasons. First, if the Eighth Circuit affirms the district court's decision, there will be a conflict in the circuits between that decision and the decision by the Fifth Circuit in the *Texas & New Orleans* case as explained in Argument II, *infra*. Also, such an affirmance will result in a conflict between the Eighth Circuit and applicable decisions by this Court which have held that the Noris-LaGuardia Act cannot be accommodated to non-labor statutes. *See, Order of Railroad Telegraphers v. Chicago & North Western R.R., supra*, 362 U.S. at 339 n.15 and accompanying text.

Consequently, an affirmance of the district court's decision by the Eighth Circuit will create more uncertainty, rather than resolve this problem.

Moreover, a reversal of the district court's decision on its merits by the Eighth Circuit will not resolve this problem finally, because the railroads, having been emboldened by the ICC's provincial view of the importance of its orders, will clearly continue to abrogate employment rights, purportedly authorized by an ICC order, which will force rail labor to strike; the railroads will then continue to seek injunctions in federal courts. Unfortunately, such injunctions are frequently granted, even if not warranted by law. *See*, F. Frankfurter & N. Greene, THE LABOR INJUNCTION at 222 (1930).

Petitioners respectfully submit that the answer to this uncertainty is for this Court to issue a writ of certiorari to the Eighth Circuit to review petitioners' pending appeal from the district court's decision, if this Court also decides to review the District of Columbia Circuit's decision in *BLE v. ICC*. *See generally, New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970).

II. By Concluding That It Had The Jurisdiction To Enjoin A Work Stoppage By Missouri Pacific Employees, Notwithstanding The Norris-LaGuardia Act, The District Court Has Decided An Important Question Of Law For The Railroad Industry In A Manner Which Conflicts With Applicable Decisions Of This Court And The Fifth Circuit

Relying upon respondents' assertions that the ICC's grant of Trackage Rights to the MKT had relieved the Missouri Pacific of any Railway Labor Act or contractual obligations it might have had to its employees to negotiate the crew selection issue, the district court concluded that, because the ICC had conclusively resolved the crew selection question against Missouri Pacific employees, petitioners did not have a right to strike the Missouri Pacific. Appendix at 27c. Since, in the district court's opinion, Congress "specifically intended the ICC to

authoritatively resolve labor disputes arising from rail consolidations" (Appendix at 26c), the threatened strike must be enjoined and the Norris-LaGuardia Act must be "accommodated" to the Interstate Commerce Act "in order to preserve the obvious purpose of giving the ICC jurisdiction over railroad consolidation proceedings." Appendix at 28c. Those conclusions, petitioners respectfully submit, improperly accommodated the two Acts by subordinating the provisions of the Norris-LaGuardia Act to a non-labor statute.

Petitioners UTU, *et al.*, respectfully submit that such a subordination of labor's interests is prohibited by the Norris-LaGuardia Act, and is contrary both to applicable decisions of this Court construing that Act and to the decision of the Fifth Circuit in *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen, supra.* Because of the importance of this issue to the railroad industry, petitioners request that this Court review the district court's decision, if this Court also grants the petitions in the *BLE v. ICC* case.

This Court has previously admonished federal courts that the Norris-LaGuardia Act must be construed broadly to effectuate its intent—*i.e.*, " to prevent the injunctions of federal courts from upsetting the natural interplay of the competing economic forces of labor and capital." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 40 (1957); *accord, Order of Railroad Telegraphers v. Chicago & North Western R.R.*, 362 U.S. 330, 335 (1960). As this Court observed before:

> There are few pieces of legislation where the congressional hearings, committee reports, and the language in the legislation itself more clearly point to the necessity for giving an Act a construction that will protect the congressional policy the Act adopted. Section 2 of this Act [29 U.S.C. 102] specifies the public policy to be taken into consideration in interpreting the Act's language and in determining the jurisdiction and authority of federal courts; *it is one of*

> *freedom of association, organization, representation and negotiation on the part of workers.* The hearings and committee reports reveal that Congress attempted to write its bill in unmistakable language because it believed previous measures looking toward the same policy against non-judicial intervention in labor disputes had been given unduly limited constructions by the courts.

Order of Railroad Telegraphers v. Chicago & North Western R.R., supra, 362 U.S. at 335-36 (footnotes omitted)(emphasis added).

In the case presently pending before the Eighth Circuit, the district court ignored those admonitions and accommodated the Norris-LaGuardia Act to an ICC order where rail labor's interests were not even considered. The resulting injunction, petitioners respectfully submit, ignored prior rulings of this Court and, contrary to the intent of the anti-injunction Act, stripped "labor of its primary weapon without substituting any reasonable alternative." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R., supra,* 353 U.S. at 41 (footnote omitted).

Even if it could be asserted validly that the conduct of the union was rendered unlawful by the ICC's order (an assertion with which petitioners disagree), this Court has held before that federal courts do not have the jurisdiction to enjoin such conduct (*e.g., Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.,* 311 U.S. 91 (1940)), for "the Norris-LaGuardia Act's ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other, nonlabor statute." *Order Railroad Telegraphers v. Chicago & North Western R.R., supra,* 362 U.S. at 339 (footnote omitted). Those rulings by this Court, the district court believed, were merely *dicta* and were not controlling here because, even though the Interstate Commerce Act "was not enacted 'as a part of a pattern of labor legislation,' . . . the ICC has jurisdiction over labor disputes in connection with consolidation

proceedings, [and, thus,] excepting the NLGA in the case at bar does not result in a great departure from established doctrine." Appendix at 28c, *quoting, Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R., supra,* 353 U.S. at 42. Contrary to the district court's belief, this case does represent a great departure from established doctrine.

In *Order of Railroad Telegraphers v. Chicago & North Western R.R., supra,* this Court addressed a railroad's assertion that a strike could be enjoined, regardless of the Norris-LaGuardia Act, when the strike was in support of an attempt by rail labor to bargain about operational changes which required prior regulatory agency approval. That argument is clearly relevant to the case at bar, and it was rejected by this Court because, after noting the rationale for the accommodation effected by the *Chicago River* case, the Court concluded that the *Chicago River* exception did not justify enjoining rail labor's bargaining efforts in that case. As the Court stated:

> Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes "concerning rates of pay, rules, and working conditions." . . . Moreover, neither the [railroad] . . . nor anyone else points to any other specific legal command that the union violated here by attempting to bring about a change in its collective bargaining agreement. It would stretch credulity too far to say that the Railway Labor Act, designed to protect railroad workers, was somehow violated by the union acting precisely in accordance with that Act's purpose to obtain stability and permanence in employment for workers. There is no express provision of law, and certainly we can infer none from the Interstate Commerce Act, making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs.

Order of Railroad Telegraphers v. Chicago & North Western R.R., supra, 362 U.S. at 339-40 (footnote omitted).

Even though that reasoning seriously questions the validity of an accommodation of the Norris-LaGuardia Act to an ICC order, the district court nevertheless disregarded the teachings of the *Railroad Telegraphers* case because the district court believed that the decision was inapposite to the case at bar which, unlike the *Telegraphers* case, involved an ICC order that, in the court's opinion, would be violated by the UTU's bargaining demands. Appendix at 24c n.9. More important, however, the district court did not follow the clear command of that case that the Norris-LaGuardia Act may not be disregarded where the conflicting law does not address the same concerns protected by the anti-injunction statute (*i.e.*, the balancing of labor's and capital's economic bargaining powers). Indeed, the district court totally ignored that essential element of the *Telegraphers* case.

In the *Texas & New Orleans* case, the Fifth Circuit was faced with a factual situation clearly analogous to the case at bar, but that court reached a result which the district court in this case acknowledged was in direct conflict with the injunction issued against petitioners. In the *Texas & New Orleans* case, the court addressed a request by railroads to enjoin a strike which a union had called in response to both the railroads' refusal to bargain and the unilateral changes which the railroads asserted were authorized by an order of the ICC. As the Fifth Circuit observed, the railroads were contending that "section 5(2)(f) of the Interstate Commerce Act [recodified as 49 U.S.C. § 11347] . . . is also part of the national pattern of labor legislation and that an injunction is necessary to carry out its provisions." 307 F.2d at 157. In rejecting that assertion, the court first reviewed this Court's admonitions concerning the reach of the Norris-LaGuardia Act, and then refused to "ac-

commodate"—*i.e.*, ignore—the anti-injunction Act because (307 F.2d at 158):

> The types of special processes which the courts have enforced with injunctive relief have all involved extensive negotiations and bargaining between the parties, or agreements which result from such bargaining; never processes which allow management to unilaterally choose a change in working conditions and give the union a small voice of protest if the change is unfair or inequitable.

Although under respondents' view of the ICC order at issue in this case, rail labor has no voice whatsoever in the crew selection process, the district court refused to follow the Fifth Circuit's decision because, in the district court's opinion, the *Texas & New Orleans* court had not properly weighed the interests behind the Interstate Commerce Act with rail labor interests. Appendix at 25c-27c. Unfortunately, in proceeding to weigh those interests, the district court did precisely what the Norris-LaGuardia Act sought to avoid—*i.e.* allowing courts to balance social-economic interests in an injunction request—based on a conclusion by Congress that experience had shown conclusively that "economic sympathies and prepossessions [of the judiciary] may unwittingly foreclose the solution of these issues." F.Frankfurter & N. Greene, THE LABOR INJUNCTION, *supra*, at 132; *see also, Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Assoc.*, *supra*, 457 U.S. at 719-20. Section 4 of the Norris-LaGuardia Act (by removing all equity jurisdiction to enjoin peaceful strikes, whether legal or illegal) was intended to prevent the federal courts from engaging in such social-economic balances; rather, that balancing feat was to be left to Congress. *Id.* at 219; *Order of Railroad Telegraphers v. Chicago & North Western R.R.*, *supra*, 362 U.S. at 342.

Petitioners UTU, *et al.*, respectfully submit that, as shown in Argument I, *supra*, this question is too important to the rail industry and to the public to be left in doubt. Petitioners,

therefore, respectfully request that this Court accept this case for review, if it accepts for the review the *BLE v. ICC* case.[10]

CONCLUSION

For the reasons set forth herein, petitioners UTU, *et al.* respectfully ask that the writ be issued as requested if this Court also accepts for review the decision of the District of Columbia Circuit in *BLE v. ICC.*

Respectfully submitted,

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Date: December 18, 1985

[10] Petitioners also challenged the scope of the district court's injunction which restrained individual Missouri Pacific-UTU employees from failing to report for work, or from otherwise failing to work as required by their contract. Petitioners submit that their challenge raises important issues under the Thirteenth Amendment to the Constitution of the United States, under Section 2, Tenth of the Railway Labor Act, 45 U.S.C. § 152, Tenth, and under Section 20 of the Clayton Anti-Trust Act, 29 U.S.C. § 52. Petitioners have included that question in this petition.

APPENDIX A

Statutes Relied Upon:

1. SECTION 20, CLAYTON ANTI-TRUST ACT, 29 U.S.C. § 52
2. NORRIS-LAGUARDIA ACT, 29 U.S.C. § 101, *et seq.*
   A. Section 4, 29 U.S.C. § 104
   B. Section 8, 29 U.S.C. § 108
   C. Section 13(c), 29 U.S.C. § 113(c)
3. INTERSTATE COMMERCE ACT, 49 U.S.C. § 10101, *et seq.*
   A. Section 11341(a) of Interstate Commerce Act, 49 U.S.C. § 11341(a), as amended.
   B. Section 11347 of Interstate Commerce Act, 49 U.S.C. § 11347
4. RAILWAY LABOR ACT, 45 U.S.C. § 151, *et seq.*
   A. Section 2, First, 45 U.S.C. § 152, First
   B. Section 2, Seventh, 45 U.S.C. § 152, Seventh
   C. Section 2, Tenth, 45 U.S.C. § 152, Tenth
   D. Section 6, 45 U.S.C. § 156
   E. Section 7, First, 45 U.S.C. § 157, First

APPENDIX A:

STATUTES RELIED UPON:

SECTION 20, CLAYTON ANTI-TRUST ACT, 29 U.S.C. § 52

§ 52. Statutory restriction of injunctive relief

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney. And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

NORRIS-LAGUARDIA ACT, 29 U.S.C. § 101, *et seq.*

A. Section 4, 29 U.S.C. § 104:

Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

B. Section 8, 29 U.S.C. § 108:

Sec. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

C. Section 13(c), 29 U.S.C. §113(c):

Sec. 13. When used in this act, and for the purposes of this act—

* * *

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

INTERSTATE COMMERCE ACT, 49 U.S.C. §10101, *et seq.*

A. Section 11341(a) of Interstate Commerce Act, 49 U.S.C. §11341(a), as amended.

The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or

exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

B. Section 11347 of Interstate Commerce Act, 49 U.S.C. § 11347

§ 11347. Employee protective arrangements in transactions involving rail carriers

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the

transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

RAILWAY LABOR ACT, 45 U.S.C. § 151, *et seq.*

A. Section 2, First, 45 U.S.C. § 152, First:

§ 152. General duties

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 2, Seventh, 45 U.S.C. § 152, Seventh:

Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

C. Section 2, Tenth, 45 U.S.C. § 152, Tenth:

Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of

the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States [United States attorney] to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: Provided, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

D. Section 6, 45 U.S.C. § 156

§ 156.

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proferred its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after

termination of conferences without request for or proffer of the services of the Mediation Board.

E. Section 7, First, 45 U.S.C. § 157, First

§ 157. Arbitration

First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: Provided, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MISSOURI PACIFIC RAILROAD COMPANY,

Plaintiff,

and

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Intervenor-Plaintiff,

C.A. No. 83-771-C(1)

vs.

UNITED TRANSPORTATION UNION, GENERAL COMMITTEE OF ADJUSTMENT, *et al.,*

Defendants.

[FILED March 30, 1984]

MEMORANDUM

This case is now before this Court on the request of the parties that the preliminary injunction entered by this Court on February 7, 1984, be made permanent. A trial on the merits was held by consent on March 16, 1984. The record was stipulated to consist of the following: 1) a "Joint Statement of Compliance With The Court's Order of March 1, 1984" (hereinafter "Joint Statement"), which is signed by counsel for all parties; 2) a bound set of "Stipulations" and documents, filed on March 9, 1984; 3) a set of "Supplemental Stipulations" and documents, filed on March 9, 1984; 4) the preliminary injunction entered by this Court on February 7, 1984; and 5) the Memorandum filed by this Court on March 1, 1984.

The Joint Statement sets out the parties' view that "there are no factual or legal issues yet to be resolved, and . . . the Court can and should make permanent the preliminary injunction issued herein." *Joint Statement* at 2,¶2. The Joint Statement further provides that "all parties agree that no further evidence or argument is necessary with regard to the causes of action raised in plaintiffs' complaints." *Id.* at 2-3, ¶2.

This Court accepts the Joint Statement of the parties and the representations contained therein. This Court's Memorandum of March 1, 1984, resolved the legal issues in this case in favor of plaintiffs and there are no genuine issues of material fact. Accordingly, judgment in favor of plaintiffs is appropriate and the preliminary injunction entered by this Court on February 7, 1984, is made permanent, as modified by the Order entered this day.

At the "trial" on March 16, 1984, defendants raised two (2) additional matters that must be dealt with. First, defendants pointed out that the scope of the injunction entered on February 7, 1984, did not contain any limitation as to the particular type of activity that was enjoined. That injunction can be construed as prohibiting strikes and other similar activity for any reason whatsoever. The Permanent Injunction entered this day adds a clause to the preliminary injunction, which corrects this deficiency. As modified, the intent of this Court to enjoin the prohibited activity only as it relates to the matters in dispute in this litigation is made clear. The parties consent to this modification.

The second point raised by defendants was a request to strike out certain language in the injunction. Specifically, defendants moved to strike the phrase "all classes of employees represented by defendants" and the word "members" in the first three (3) lines of the second paragraph of the February 7, 1984, injunction. Defendants argue that the existence of this language in the injunction violates 45 U.S.C. § 152, Tenth, and

the thirteenth amendment to the United States Constitution. *U.S. Const., amend. XIII.* This Court rejects both arguments. As to 45 U.S.C. § 152, Tenth, it is the opinion of this Court that the analysis which this Court utilized to find that the ICC exempted plaintiffs from the requirements of the RLA applies here to exempt the proviso in 45 U.S.C. § 152, Tenth. *See Memorandum of March 1, 1984* at 16-17, 18-19. If the injunction does not apply to plaintiffs' employees or defendants' members, plaintiffs are without protection from "wildcat" strikes. Plaintiffs' employees and defendants' members could thereby frustrate the power of the ICC over labor disputes in trackage rights proceedings.

Defendants' thirteenth amendment argument must also be rejected. The thirteenth amendment prohibits involuntary servitude. The injunction herein does not compel any employee to work against his will, nor does it prohibit any employee from voluntarily quitting. The injunction only prohibits work stoppages arising out of the matters in dispute in this litigation. Therefore, the injunction does not violate the thirteenth amendment. *See United States v. Martinez,* 686 F.2d 334, 345-46 (5th Cir. 1982); *New Orleans Steamship Assn. v. General Longshore Workers,* 626 F.2d 455, 463 (5th Cir. 1980), *aff'd sub. nom., Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Assn.,* ____U.S.____, 102 S.Ct. 2673 (1982).

Accordingly, defendants' request to strike certain language from the injunction be and is denied.

/s/ JOHN F. NANGLE
UNITED STATES DISTRICT JUDGE

Dated: March 30, 1984

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MISSOURI PACIFIC RAILROAD COMPANY,

Plaintiff,

and

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Intervenor-Plaintiff,

No. 83-771C(1)

vs.

UNITED TRANSPORTATION UNION, GENERAL COMMITTEE OF ADJUSTMENT, *et al.,*

Defendants.

[FILED March 1, 1984]

MEMORANDUM

This case is now before this Court on the motion of plaintiff Missouri Pacific Railroad Company (hereinafter "MOPAC") and intervenor-plaintiff Missouri-Kansas-Texas Railroad Company (hereinafter "KATY") for a preliminary injunction enjoining defendants and their members from striking either railroad.[1] In addition, there are several other motions which are now pending before this Court. These include: 1) defendants' motion to refer two (2) issues to the Interstate

[1] On February 7, 1984, this Court granted plaintiffs' motion for a preliminary injunction. At that time this Court issued a very brief memorandum which stated in summary fashion the reasons for granting plaintiffs' motion. This Court indicated that a more complete and detailed explanation of this Court's ruling would be forthcoming. The memorandum filed herein this day is the memorandum promised. However, in addition to discussing plaintiffs' motion for a preliminary injunction, this memorandum addresses the pending motions for referral to the Interstate Commerce Commission and for summary judgment.

Commerce Commission pursuant to 28 U.S.C. § 1336(b); 2) plaintiffs' motions for summary judgment on its complaint and dismissal of or summary judgment on defendants' counterclaims; and 3) defendants' cross-motion for summary judgment on plaintiffs' complaint.

I MOTION FOR PRELIMINARY INJUNCTION

The motion for a preliminary injunction was submitted to this Court on a stipulated record consisting of the following: 1) a stipulation of fact[2]; 2) the affidavit of Irving Newcomb which, *inter alia*, attests to the accuracy of the facts stated in defendants' (hereinafter "UTU") "Statement of Facts" contained in *Memorandum of Defendants in Support of Their Cross-Motion To Dismiss, etc.* at 2-12; and 3) the affidavit of O.B. Sayers which, *inter alia*, attests to the accuracy of the facts stated in plaintiff MOPAC's "Background Facts" contained in *Memorandum of Plaintiff Missouri Pacific Railroad Company In Support of Its Motions etc.* at 4-8. In addition, this Court takes judicial notice of the orders of the Interstate Commerce Commission (hereinafter "ICC") entered in connection with the application of MOPAC to consolidate with the Union Pacific Railroad Company (hereinafter "UPRR"). *Fed.R.Ev.* 201. This Court, having considered the record in this case, the pleadings, briefs and exhibits submitted in support of and in

[2] The manner in which the parties developed the record for this motion was poor to say the least. As stated in this Court's *Memorandum* dated February 7, 1984, the parties stipulated to a record in this case during an in-chambers conference, held on-the-record, on February 1, 1984. It was represented that a so-called "Stipulation of Fact" existed and had been filed along with the parties' pre-trial material. The file contained a document captioned "Stipulations", which had been filed by plaintiffs, and it contained the signatures of counsel for MOPAC and KATY only. It did not contain the signature of any representative of UTU. It was not until February 6, 1984, that this Court received and filed a copy of the "Stipulations" with a signature of counsel for UTU on it. However, even this document does not contain the signature of KATY's counsel. This Court assumes that, given the fact that counsel for KATY's signature appears on a copy of this document elsewhere in the file, it is a valid and binding stipulation of fact.

opposition to the motion for a preliminary injunction, hereby makes the following findings of fact and conclusions of law.

A. FINDINGS OF FACT

1. Plaintiff MOPAC is a common carrier regulated by the Interstate Commerce Commission ("ICC"). MOPAC offers rail freight transportation over 11,500 miles of railroad; its principal north-south lines extend to Louisiana and Texas from Chicago via St. Louis and from Omaha via Kansas City.[3]

2. Intervenor KATY is a common carrier regulated by the ICC. KATY offers rail freight transportation over 2,100 miles of railroad; its major lines serve San Antonio, Houston and Galveston. Until January, 1983, the northern-most points served by KATY were St. Louis and Kansas City.

3. Defendant UTU is a railway labor organization duly authorized, under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, to represent certain employees of MOPAC and KATY who are members of the crafts or classes of conductors, brakemen, yardmen, firemen, hostlers and helpers. All other defendants are agents and officials of UTU and/or the General Committee of Adjustment for MOPAC.

4. MOPAC has several agreements with UTU that govern certain rates of pay, rules and working conditions of UTU members employed by MOPAC. One agreement, last rewritten December 1, 1982, applies to the crafts or classes of locomotive firemen, hostlers and hostler helpers; a second agreement, last rewritten September 1, 1979, applies to the crafts or classes of conductors, trainmen and yardmen.

5. On September 15, 1980, UPRR and MOPAC submitted to the ICC applications for approval of their proposed consoli-

[3] Paragraphs 1 through 13 of these "Findings of Fact" are substantially verbatim portions of the "Stipulation" signed by the parties. MOPAC is sometimes referred to as "MPRR" or "MP" and KATY is sometimes referred to as "MKT".

dation. These applications were submitted pursuant to the Interstate Commerce Act, 49 U.S.C. § 11344. From March, 1981, until January, 1982, the ICC held extensive hearings on these applications.

6. UTU participated in the ICC proceedings, opposing the applications and seeking conditions that would protect railroad employees affected by the transportations. KATY participated in the proceedings and opposed the consolidation; alternatively, if the consolidation were approved, KATY sought "trackage rights" that would allow it to operate over MOPAC tracks between, among other points, Kansas City, on the one hand, and Council Bluffs, Iowa, Omaha, Union, Lincoln and Atchison, Nebraska, and Topeka, Kansas, on the other hand. *See* ICC Finance Docket 30,000 (Sub-No. 25). MOPAC opposed the trackage rights condition sought by KATY. The trackage rights application of KATY was filed in January of 1981 and the proposed trackage rights agreement included therein provided: "MKT, with its own employees, at its sole cost and expense, *shall* operate its engines, cars and trains on and along Joint Track." *See* F.D. No. 30,000 (Sub-No. 8) *et al* (October 19, 1983), at 8 (emphasis added).

7. By decision and order dated October 20, 1982, the ICC approved the consolidation of UPRR and MOPAC, as well as the application of KATY for trackage rights, over MOPAC lines between Kansas City, on the one hand, and Council Bluffs, Iowa, Omaha, Union, Lincoln and Atchison, Nebraska, and Topeka, Kansas, on the other hand. *Union Pacific Corp., et al.—Control—Missouri Pacific Corp.*, 366 I.C.C. 459, 642, 653 (1982); *pet. for rev. pending*, D.C. Cir. Nos. 82-2253, *et al.* The ICC's Order provided that the trackage rights, which it concluded were necessary to ameliorate competitive effects of the approved consolidation, would be effective immediately upon consummation of the consolidation. The ICC's Order did not specify compensation terms, but allowed the parties to nego-

tiate such terms. In a recent decision of the ICC, Finance Docket No. 30,000 (Sub-No. 25), the ICC recognized that it has plenary authority to impose such trackage rights under the Interstate Commerce Act, 49 U.S.C. § 11341, *et seq.*

8. The ICC's Order approving the trackage rights requested by KATY in F.D. 30,000 (Sub-No. 25) provided that the trackage authority was "subject to employee protective conditions to the extent specified in *Norfolk and Western Ry. Co.-Trackage Rights-BN,* 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.-Lease and Operate,* 360 I.C.C. 653, 664 (1980)." 366 I.C.C. at 654 (¶ 19). These conditions are commonly referred to in the railroad industry as the "Norfolk and Western" conditions (hereinafter "N&W").

9. On November 9, 1982, UPRR, MOPAC and KATY filed with the ICC a "Stipulation" reflecting their agreements in principle on the terms and conditions of the anticipated trackage rights operations (other than permanent compensation terms). The Stipulation provided that "the parties will enter into a standard form trackage rights agreement to implement KATY's trackage rights."

10. The consolidation of UPRR and MOPAC was effected on December 22, 1982. By letter dated December 31, 1982, MOPAC advised the General Chairman of UTU, among others, that KATY was expected to initiate trackage rights operations on January 3, 1983, and that "[n]o Missouri Pacific employees will be adversely affected as a result of the utilization of these trackage rights . . . ." In response, R. D. Hogan of UTU sent a letter dated January 4, 1983, to O. B. Sayers of MOPAC, which stated in part:

> The Katy Railroad has no terminals north of Kansas City, Missouri and prior to this time has not handled any service beyond that point. This service has traditionally been handled by the employees we

represent on the Missouri Pacific (Proper) Railroad, and it is our position that any and all service operated northward on Missouri Pacific tracks out of Kansas City, Missouri be protected by Missouri Pacific (Proper) road crews. Request is hereby made that such service be protected as indicated above.

11. On January 5, April 11 and April 13, 1983, the KATY entered into separate agreements with representatives (the UTU) of its engine and train service employees concerning the implementation of the trackage rights over MOPAC's track as authorized in Finance Docket 30,000 (Sub-No. 25).

12. KATY, using KATY employees, initiated operations over the trackage rights on or about January 6, 1983. KATY is presently using its own employees to pick-up and set-out rail cars at Atchison and Union, Nebraska and at Council Bluffs, Iowa.

13. The formal terms and conditions (other than the terms of the compensation owed MOPAC for KATY's trackage rights) are set forth in a standard form trackage rights agreement filed with the ICC March 9, 1983 ("the Trackage Rights Agreement"). The Trackage Rights Agreement recognizes that KATY "shall, with its own employees, at its sole cost and expense, operate its trains, locomotives and cars over" MOPAC's Omaha-Kansas City line.

14. By Mailgram dated March 28, 1983, and directed to MOPAC, UTU officials Newcomb and Hogan stated, as follows:

> The undersigned representing conductors, road brakemen, yardmen, firemen, hostlers, and hostler helpers on the Missouri Pacific (proper) have exhausted our patience and goodwill in attempting to have you stop the use of MKT employees manning freight trains over Missouri Pacific lines between

> Kansas City and Omaha. This will serve as notice that if arrangements are not made to halt this trespass on our collectively bargained agreements and our seniority by non-Missouri Pacific employees, the employees under the jurisdiction of our committees will peacefully withdraw from service on those parts of the Missouri Pacific Railroad under our jurisdiction at 12:01 AM April the 4th 1983.

15. On March 30, 1983, MOPAC filed its complaint, against the UTU and several of its officers, under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 11341 *et seq.*, seeking declaratory and injunctive relief against the threatened strike. On the same day this Court granted a Temporary Restraining Order prohibiting defendants from engaging in any strike or related activities against plaintiff. Thereafter, KATY intervened as a plaintiff and joined in MOPAC's request for relief. The UTU also filed a counterclaim against MOPAC and KATY alleging, in two (2) counts, that MOPAC violated the Railway Labor Act and that MOPAC and KATY violated the terms of the ICC's Order approving the application of KATY for trackage rights. The Temporary Restraining Order was extended beyond the ten (10) day limit of Rule 65(b), *Fed.R.Civ.P.* 65(b), several times by agreement of the parties. The last such extension expired at 10:00 A.M. on February 7, 1984.

16. MOPAC has numerous trackage rights arrangements whereby other carriers, including KATY, operate over its lines and whereby MOPAC operates over the lines of other carriers, including KATY.

17. Article 1, § 4 of the N&W conditions provides, in pertinent part, as follows:

> When the railroads contemplate a transaction, they shall give at least twenty (20) days' written notice of such intended transaction . . . .
>
> At the request of either railroad or representatives of such interested employees, negotiations for the purpose of reaching agreement with respect to application of the [N&W conditions] shall commence immediately and continue for not more than twenty (20) days from the date of notice. Each transaction which will result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4.

354 I.C.C. at 610-611. With respect to KATY's trackage rights over MOPAC lines, neither MOPAC nor KATY gave the notice called for by Art. I, § 4, to MOPAC employees. However, several conferences concerning the grant of trackage rights to KATY were held between, *inter alia*, Irving Newcomb for UTU and O. B. Sayers for MOPAC. These conferences occurred between January 4, 1983, and March 28, 1983. According to Mr. Newcomb, at a conference held on March 7, 1983:

> [T]he UTU requested MoPac to negotiate with the UTU regarding (1) the transfers to MKT of the right to operate over MoPac tracks to perform work previously performed by MoPac operating employees, and (2) the effects of such a transfer of operating rights on MoPac employees represented by UTU.

Aff. of I. Newcomb, ¶ 3. Mr. Newcomb states that MOPAC refused this request, relying upon actions and orders of the ICC. *Id.*

18. On May 12, 1983, the ICC issued a decision denying the petition of the Brotherhood of Locomotive Engineers (hereinafter "BLE") for clarification of the ICC's decision approving the consolidation of UPRR and MOPAC. F.D. No. 30,000 (Sub-No. 18) *et al.* (May 12, 1983). The ICC summarized the position of BLE, as follows:

> BLE seeks to have the consolidation decision clarified with respect to whether MKT . . . may use their own operating crews in performing trackage rights operations over MP lines. It asserts that this commission has no jurisdiction over crew assignment matters and that our decision should not be construed as authorizing MKT . . . to use their own crews in the performance of the approved operations. It indicates that these matters are subject to settlement in accordance with the Railway Labor Act and are not within the scope of our decision approving the responsive trackage rights applications.

Id. at 2-3. In denying BLE's petition the ICC stated:

> Inasmuch as . . . MKT proposed in [its] applications that the operations would be performed with [its] own crews, our approval of the applications authorizes such operations. Our decisions of November 24, 1982, and January 18, 1983, unambiguously specified that trackage rights tenants may perform operations using their own crews.

Id. at 4. Moreover, the ICC added:

> We have broad authority to impose conditions on consolidations and our jurisdiction is plenary. Therefore, we properly authorized performance of trackage rights tenants using their own crews.

Id. at 5.

19. On June 16, 1983, UTU sent a letter to several carriers, including MOPAC and KATY, requesting that those carriers "comply fully with [the] advance notice and negotiation requirements" of Art. I, § 4 of the N&W conditions.

20. MOPAC rejected UTU's request in a letter dated June 23, 1983. MOPAC interpreted UTU's letter as a request to enter into negotiations aimed at reaching a "single implementing agreement" with respect to the selection of forces for trackage rights tenants. MOPAC, relying on the May 18, 1983, order of the ICC which "confirm[ed] the inability of MPRR and UPRR to bind their trackage rights tenants to an agreement regarding selection of forces", stated that "it would be inappropriate and unproductive for MPRR and UPRR to participate in" a meeting or negotiations aimed at reaching such an agreement. However, MOPAC's letter did express a willingness to negotiate with UTU "issues of mutual interest arising from the recently approved consolidations . . . ."

21. KATY responded to the UTU in a letter dated June 22, 1983. KATY also rejected the UTU's request, relying on the ICC's orders and the fact that it had already met and negotiated implementing agreements with its own employees who are represented by the UTU.

22. On June 29, 1983, the UTU filed a pleading with the ICC which sought reconsideration of the ICC's May 18, 1983, denial of the petition for reconsideration. In that pleading the UTU asked the ICC to rule:

> [T]hat its prior orders (1) did not select the forces to perform the trackage rights operations, (2) did not relieve the carriers of their obligations under the Railway Labor Act to avoid unilateral changes of working conditions, and (3) did not relieve the carriers of their obligations to comply with the notice and negotiation provisions of the employee protective pro-

visions imposed in the sub-proceedings at bar to protect the interests of MP employees affected by those transactions.

23. The ICC rejected *all three* of the UTU's arguments in a decision dated October 19, 1983. F.D. No. 30,000 (Sub-No. 18) *et al.* (October 19, 1983). The ICC stated:

> Petitioners contend that UP-MP employees, through their bargaining agents, have the right to participate in the trackage rights crew selection process and have the right to have any related disputes resolved pursuant to the RLA and the applicable labor protective conditions. We find these arguments to be unpersuasive and unsupported by the record in these proceedings.

Id. at 4-5. The ICC further concluded that:

> Provisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and may be implemented without any other approval. Further, the agreement is exempted from any requirements of law that could frustrate implementation of the trackage rights agreement as approved, including the crew assignment provision.

24. The strike threatened by UTU will cause a disruption of service to MOPAC and its shippers, and result in severe, immediate and irreparable injury to MOPAC. MOPAC, which operates over 3,400 trains per week, carrying 2,300,000 tons of freight, would be placed in serious jeopardy by the threatened strike. The injury to MOPAC's thousands of shippers, especially those exclusively served by MOPAC, would be irreparable. *Aff. of O.B. Sayers,* ¶ *4.*

B. CONCLUSIONS OF LAW

1. INTRODUCTION

This action arises under the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 11341 *et seq.* This Court has subject matter jurisdiction under 28 U.S.C. § 1331(a) and 1337.

Plaintiff and plaintiff-intervenor's complaints seek preliminary and permanent injunctive relief against defendants' threatened strike. Plaintiffs contend in their complaints that the dispute which gives rise to this action concerns the interpretation and application of the collective bargaining agreements between MOPAC and UTU. According to plaintiffs, the dispute is therefore a "minor" dispute within the meaning of the RLA and defendants are required by § 153 of the RLA to submit the dispute to the exclusive jurisdiction of the National Railway Adjustment Board (NRAB) rather than strike. Plaintiffs also allege that defendants' strike would violate § 152, First of the RLA, which requires carriers and employee representatives to exert every reasonable effort to settle disputes, because defendants failed to invoke the binding arbitration provisions of the employee protective conditions that were imposed by the ICC. *See Finding of Fact No. 8.* Additionally, plaintiffs contend that defendants' proposed strike action is barred by the doctrines of estoppel, collateral estoppel, and res judicata.[4]

Defendants counterclaimed for declaratory and injunctive relief. In Count I of their counterclaim defendants allege that MOPAC violated § 156 of the RLA by unilaterally changing the actual and objective working conditions of its employees,

[4] This Court declines to express an opinion as to the merits of these claims. The record on these questions is not adequate to make any findings concerning the collateral estoppel or res judicata effect of the ICC proceedings in the case at bar. The same is true of the estoppel and bar claim. Moreover, this Court's disposition of plaintiffs' other claims herein makes it unneccesary for this Court to determine these questions at this time.

i.e., by authorizing KATY to operate over MOPAC tracks with KATY crews, without complying with the notice and negotiation requirements of § 156. In Count II defendants allege that both MOPAC and KATY violated Article 1, §§ 2 and 4 of the N&W conditions imposed by the ICC, *see Finding of Fact No. 8,* by not preserving working conditions that prevailed prior to the transaction (Art. 1, § 2), and by failing to give twenty (20) days prior notice and to negotiate over the selection of forces to operate the trackage rights (Art. 1, § 4). Defendants seek an injunction requiring plaintiffs to restore the status quo that existed prior to the trackage rights transfer, prohibiting trackage rights operations until plaintiffs comply with Article 1, section 4 of the N&W conditions, and making all employees whole for their losses due to plaintiffs' alleged infractions.

Plaintiffs' motion for a preliminary injunction against defendants' proposed strike presents a unique and complex problem. The decision whether to enjoin defendants' threatened strike requires this Court to reconcile several federal statutes: 1) the Norris-LaGuardia Act (hereinafter the "NLGA"), 29 U.S.C. § 101 *et seq.;* 2) the Railway Labor Act (hereinafter the "RLA"), 45 U.S.C. § 151 *et seq.;* and 3) the Interstate Commerce Act (hereinafter the "ICA"), 49 U.S.C. § 11341 *et seq.* Essentially, defendants argue that the NLGA deprives this Court of the power to issue an injunction against defendants' threatened labor strike. Because this Court declines to read the NLGA in a vacuum, defendants' argument must be rejected. This Court will first address the NLGA problem and then will analyze the four (4) traditional criteria for determining whether preliminary injunctive relief is warranted.

2. DOES THE NORRIS-LaGUARDIA ACT BAR A LABOR INJUNCTION IN THIS CASE?

Section 104 of the NLGA provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or

> permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts: (a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . . .

29 U.S.C. § 104. In addition, § 108 of the NLGA provides:

> No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

29 U.S.C. § 108. Defendants contend that § 104 deprives this Court of jurisdiction to enjoin defendants' threatened strike. Alternatively, defendants argue that if this Court does have jurisdiction to enjoin defendants' threatened strike, then injunctive relief must be denied because plaintiffs have not met the requirements of § 108.

Plaintiffs respond that the underlying labor dispute is a "minor" dispute within the meaning of the RLA and, therefore, the NLGA is no bar to the power of this Court to enjoin defendants' threatened strike. Alternatively, plaintiffs argue that if the underlying labor dispute is a "major" dispute within the meaning of the RLA, then plaintiffs are exempt, under the ICA, from any duty to negotiate with defendants concerning crew selection for KATY's trackage rights and the NLGA must give way to the power and jurisdiction of the ICC in this situation. Plaintiffs do not specifically address defendants' § 108 argument.

As stated in this Court's order of February 7, 1984, and as explained more fully below, this Court holds that: 1) this is a "minor" dispute within the meaning of the RLA and, therefore, § 104 of the NLGA does not bar a labor injunction; 2) alternatively, if this is a "major" dispute within the meaning of the RLA, defendants' proposed strike would be illegal because plaintiffs have no duty to negotiate with defendants concerning crew selection for KATY's trackage rights, and § 104 of the NLGA must give way to the ICC's power to determine labor disputes in connection with consolidation and trackage rights proceedings; and 3) § 108 of the NLGA does not prevent the issuance of a preliminary injunction because plaintiffs have not violated its provisions. Each of these three (3) will be discussed in turn below.

a. THIS IS A "MINOR" DISPUTE AND THE NORRIS-LaGUARDIA ACT DOES NOT BAR A LABOR INJUNCTION

The RLA, which governs labor relations in the railroad industry, draws a significant distinction between "minor" disputes and "major" disputes. In an often-quoted passage, the Supreme Court described the distinction, as follows:

> [Major disputes] relate . . . to disputes over the formation of collective bargaining agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> [Minor disputes], however, contemplate . . . the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with refer-

> ence to a specific situation or to an omitted case. . . . In either case the claim is to rights accrued, not merely to have ones created for the future.

Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711, 723 (1945). *See also Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 33 (1957); *Chicago and Northwestern Transportation Co. v. United Transportation Union*, 656 F.2d 274, 277-78 (7th Cir. 1981); *International Brotherhood of Teamsters, etc. v. Braniff International Airways, Inc.*, 437 F.2d 1272, 1274 (5th Cir. 1971). The distinction between the two types of disputes is significant because it affects the procedure for settling disputes and the applicability of the NLGA's prohibition against federal court labor injunctions.

If a dispute is a "minor" dispute and it cannot be resolved by the normal grievance procedure, then the parties must submit their differences to the NRAB, the jurisdiction of which is exclusive. *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972); *Chicago and Northwestern Transportation Co.*, 656 F.2d at 277. For this reason, a strike over "minor" disputes violates the RLA and may be enjoined by a federal district court, the prohibitions of the NLGA notwithstanding. *Locomotive Engineers v. Louisville & Nashville Railroad Co.*, 373 U.S. 33(1963); *Chicago River*, 353 U.S. at 40-42; *Chicago and Northwestern Transportation Co.*, 656 F.2d at 277. On the other hand, "[i]f the dispute is 'major', . . . the union may strike to secure its position if after negotiation between the parties, mediation by the National Mediation Board, and, possibly, a review and report by an emergency board appointed by the President, a settlement is not reached." *Chicago and Northwestern Transportation Co.*, 656 F.2d at 277. *See also Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, 314 F.2d 424, 431 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

Strikes over "minor" disputes may be enjoined despite the NLGA, because such strikes violate the mandate of the RLA

that such disputes be conclusively resolved through the NRAB machinery created by the RLA. In *Chicago River* the Supreme Court held that the earlier and general provisions of the NLGA must be accommodated to the later and more specific provisions of the RLA. 353 U.S. at 40-42. The Court also explained that the NLGA prevents the issuance of an injunction against a railway labor strike over a "major" dispute, because the RLA "does not provide a process for a final decision like that of the Adjustment Board in a 'minor dispute' case." *Id.* at 42n.24.

In the case at bar the underlying labor dispute is a "minor" dispute. The essential test is whether the dispute "evolv[es] from the bargaining process for a new or altered contract," or whether the dispute is "over the meaning of an existing collective bargaining agreement." *Id.* Here, the strike threat mailgram from UTU is the best indication that the dispute is the latter rather than the former. UTU's mailgram demanded a halt to MOPAC's "trespass on our collectively bargained agreements and our seniority." *Finding of Fact No. 14.* UTU's reliance on the collective bargaining agreements and the seniority provisions therein lead to the conclusion that the dispute is arguably and reasonably susceptible to resolution by reference to the contracts between the parties. *Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, 655 F.2d 155, 158-59 (8th Cir. 1981); *United Transportation Union v. Burlington Northern, Inc.*, 458 F.2d 354, 357 (8th Cir. 1972); *International Brotherhood of Teamsters, etc. v. Braniff International Airways, Inc.*, 437 F.2d 1272, 1274 (5th Cir. 1971).

UTU argues that the reference in the mailgram to the exhaustion of UTU's "patience and goodwill in attempting to have [MOPAC] stop the use of MKT employees" on KATY trains running over MOPAC lines, makes this a "major" dispute. *Finding of Fact No. 14.* UTU contends that this refers to efforts to negotiate a new contract or to change the existing collective bargaining agreement. However, the language relied upon is ambiguous at best and does not deviate from the basic

position of UTU expressed in the mailgram—that MOPAC is breaching the collective bargaining agreements *currently in effect* by allowing KATY employees to operate KATY's trackage rights over MOPAC lines. The language relied upon by UTU does not convince this Court that what UTU was actually trying to do was to bargain for a new or altered contract.

UTU next argues that the allegations in its counterclaim make this a "major" dispute. In ¶9 of UTU's counterclaim against MOPAC, UTU alleges that an "actual and objective working condition" of the relationship between MOPAC and UTU was that trains operating over MOPAC tracks or serving customers on those tracks be manned by MOPAC crews. UTU further alleges that MOPAC unilaterally changed that working condition by allowing KATY crews to operate KATY trains on MOPAC lines. *Counterclaim ¶14.* The UTU contends that this creates a "major" dispute because MOPAC violated §152, Seventh[5] and §156[6] of the RLA by making such changes

[5] 45 U.S.C. § 152, Seventh, provides:

> Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

[6] 45 U.S.C. § 156, provides:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended (change in agreements) affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

without following the procedure in §156. 45 U.S.C. §152, Seventh; §156.

The law is clear that a change in "working conditions" which violates §152, Seventh and §156, is a "major" dispute where the contract involved is not "reasonably susceptible" to an interpretation that the change is justified or permitted by the contract. *Trans World Airlines*, 655 F.2d at 157-59. *See also Burlington Northern*, 458 F.2d at 357; *Braniff International Airways*, 437 F.2d at 1274. However, this rule is not applicable here, where the ICC's approval of the trackage rights arrangement exempts MOPAC from its duty under §152, Seventh and §156, at least with respect to the crewing provisions of the trackage rights agreement.

The ICC's exemption power is found in §11341(a) of the Interstate Commerce Act, which provides, in pertinent part:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. . . . A carrier, corporation, or person participating in [an] approved or exempted transaction *is exempt* from the antitrust law and *from all other law*, including State and municipal law, *as necessary to let that person carry out the transaction*, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

49 U.S.C. §11341(a). The exemption provided by §11341(a) is self-executing, *Chicago and Northwestern Railway Co.*, 314 F.2d at 432, but here the ICC twice made it clear that MOPAC and KATY are exempt from any requirements of the RLA concerning the crew selection clause in the approved trackage rights agreement. *See Findings of Fact Nos. 18, 22, 23. See Chicago & North Western Railway Co.*, 314 F.2d at 431-32 (no express or implied exception of RLA provisions from ICC exemption power).

It is the opinion of this Court that § 11341(a) exempts MOPAC from any duty under RLA § 152, Seventh or § 156 concerning the use of KATY employees on MOPAC lines. *See also* Part 1,2,b, *infra.* UTU argues that this Court must make a *de novo* determination of whether such an exemption is "necessary to let [MOPAC] carry out the transaction. . . ." 49 U.S.C. § 11341(a). Although such a determination may be necessary where the ICC has failed to expressly make any findings concerning exemption, *see Chicago and Northwestern Railway Co.*, 314 F.2d at 432, it is not necessary here where the ICC has expressly relieved MOPAC from the obligations of the RLA. To the extent the UTU challenges this action of the ICC, it may not do so in this forum. The United States Courts of Appeals are vested with exclusive jurisdiction to determine the validity of orders of the ICC. 28 U.S.C. § 2342. UTU's reliance on *Texas and New Orleans Railroad Company v. Brotherhood of Railroad Trainmen,* 307 F.2d 151 (5th Cir. 1962), *cert. denied,* 371 U.S. 952 (1963), *reh. denied,* 375 U.S. 871 (1963), is misplaced, because in that case there was no express finding by the ICC that the provisions of the RLA should be exempted. Moreover, to the extent that *Texas and New Orleans Railroad* stands for the proposition that § 11341(a) cannot operate to relieve a carrier of its obligations under the RLA, this Court respectfully rejects that proposition.

Finally, UTU argues that this dispute cannot be considered a "minor" dispute, because if MOPAC is exempt from the requirements of the RLA, then MOPAC cannot be required to submit this dispute to a final and binding decision by the NRAB. More importantly, UTU argues that because MOPAC need not submit the dispute to the NRAB, the rationale for excepting strikes over "minor" disputes from the prohibitions of the NLGA is absent, and, therefore, the NLGA applies to prohibit an injunction against the threatened strike. This is an interesting argument, but it is the opinion of this Court that, assuming MOPAC is exempt from the RLA requirement that

"minor" disputes be submitted to the NRAB, it does not follow that the rationale for excepting "minor" disputes from the prohibitions of the NLGA is absent.

The rationale is not absent, because the ICA provides "a process for a final decision," *Chicago River,* 353 U.S. at 42n.24, and here the ICC rendered a final decision as to the validity of KATY's use of KATY employees to operate its trackage rights. In *Chicago and North Western Railway Co.,* the Eighth Circuit made it clear that the ICC has jurisdiction to determine labor disputes, whether "minor" or "major", in connection with its power to approve mergers and consolidations. 314 F.2d at 431. Here the ICC resolved the crew selection question against UTU, and to that extent the jurisdiction of the NRAB is displaced. Just as the NLGA is excepted to enforce the labor jurisdiction of the NRAB, in this case the NLGA is excepted to enforce the labor jurisdiction of the ICC.[7]

In sum, this is a "minor" dispute and § 104 of the NLGA does not deprive this Court of jurisdiction to enjoin defendants' threatened strike.

b. EVEN IF THIS IS A "MAJOR" DISPUTE, THE PROHIBITIONS OF THE NORRIS-LaGUARDIA ACT ARE DISPLACED BY THE POWER AND JURISDICTION OF THE ICC UNDER THE INTERSTATE COMMERCE ACT

This Court finds it necessary to rest this Court's conclusion that the NLGA does not prevent an injunction against UTU's threatened strike from issuing, upon an alternative basis: Even if this is a "major" dispute, MOPAC was exempted from any RLA duty to negotiate over the selection of crews and the NLGA must give way to protect the integrity of the jurisdiction and orders of the ICC under the ICA.

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[7] It may be argued that the analogy between the NRAB jurisdiction over "minor" labor disputes and the ICC jurisdiction over labor disputes is not perfect as it relates to the NLGA, because the ICA was not "adopted as a part of a pattern of labor legislation." *Chicago River,* 353 U.S. at 42. This argument is dealt with in section b, *Infra.*

As discussed *supra*, it is the opinion of this Court that MOPAC is exempted under § 11341(a) of the ICA, 49 U.S.C. § 11341(a), from the requirements of the RLA with respect to "major" disputes. RLA § 156 imposes a duty on carriers to negotiate over certain "major" disputes. 45 U.S.C. § 156 It is easy to see why it is necessary that MOPAC be exempted from that duty, insofar as it relates to UTU's demand that MOPAC negotiate over the selection of forces to operate KATY trains on MOPAC lines. There is nothing that UTU/MOPAC negotiations could do to change the crew selection provisions approved by the ICC. Under the ICA the ICC has authority to approve transactions, including trackage rights agreements, between carriers, 49 U.S.C. § 11341 *et seq.* Here the ICC expressly and emphatically stated that "[p]rovisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and *may be implemented without further approval.*" F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983), at 15 (emphasis added). *See Finding of Fact No. 23.* MOPAC cannot unilaterally change a material term of a trackage rights agreement approved by the ICC and therefore MOPAC was immune from any requirement of the RLA to negotiate over such a material term.[8] *Norfolk & Western Railroad Co. v. Nemitz*, 404 U.S. 37 (1971). Nevertheless, UTU argues that it is still free to strike MOPAC over its refusal to negotiate about the selection of forces for KATY trains operating on MOPAC lines.

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[8] UTU argues that § 11347, 49 U.S.C. § 11347, which provides that "[n]otwithstanding this subtitle, the arrangements [to impose employee protective conditions] may be made by the rail carrier and the authorized representative of its employees," authorizes MOPAC and UTU to negotiate over the crew selection issue. However, the crew selection clause in the trackage rights agreement is a material term of the agreement which the ICC approved and is not one of the employees protective conditions that may be altered by the carrier and the employee representative. Moreover, the use of the term "may" in the provision relied upon by UTU suggests that it is permissive rather than mandatory. Therefore, MOPAC does not have any *duty* to negotiate with UTU under that provision.

The authority of the ICC in consolidation and trackage rights proceedings is plenary and exclusive. 49 U.S.C. § 11341(a); *Chicago & North Western Railway Co.*, 314 F.2d at 431. In *Chicago & North Western Railway Co.*, the Eighth Circuit held that this power includes jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers. *Id.* There the union argued that it had a right to strike over five jobs which were being eliminated, and other seniority problems, pursuant to an ICC-approved merger. The issue in that case was whether disputes arising from the merger must be resolved according to the procedures of the RLA or the arbitration provisions of the ICC order approving the consolidation in question. In affirming the district court's ruling that the ICC order controlled and that the RLA procedures were inapplicable, the Court of Appeals extensively discussed the relationship between the jurisdiction of the ICC over consolidations and the rights of employees affected thereby. *Id.* at 427-33.

The *Chicago & North Western Railway Co.* Court held that the ICC has the right to make provisions, in approving consolidations, that conflict with existing collective bargaining agreements and RLA procedures. *Id.* at 427. The Court found the "major"/"minor" analysis inapplicable because the RLA had been exempted by the ICC. *Id.* at 429. Accordingly, the ICC had the power to authorize changes in working conditions and to resolve conflicting seniority rights free from the constraints of the RLA. *Id.*

Moreover, the Court found support for its conclusion in the legislative history of the ICA. The Court pointed out that the Harrington amendment to the ICA, which would have brought about a freeze of existing employees in their job rights and thereby would have threatened to prevent all consolidations, *id.* at 430, was defeated. The Court concluded that Congress intended the jurisdiction of the ICC to displace RLA procedures in merger-related disputes:

> Thus under the Railway Labor Act provisions, it is possible for either party to completely block any change in working conditions by refusing to agree to a change and refusing to arbitrate. Like the Harrington amendment, the Railway Labor Act, if it applied, would threaten to prevent many consolidations.

Id. at 431. Several years later the Eighth Circuit read *Chicago & North Western Railway Co.* as holding that "the employees did not have a right to strike over merger-related disputes." *General Committee of Adjustment v. Burlington Northern, Inc.*, 563 F.2d 1279, 1285 (8th Cir. 1977).

UTU relies heavily[9] upon *Texas & New Orleans Railroad Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962). In that case the carrier had given the union notice, under RLA § 156, of an intended change in operation. The carrier had also applied for and received approval from the ICC to carry out the change, which approval imposed certain employee protective conditions. However, the union threatened to strike after the carrier put the approved changes into effect and the carrier then brought suit to enjoin the strike. The Court affirmed the district court's denial of an injunction and rejected all arguments that the NLGA was displaced by the provisions of the ICA.

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[9] UTU also relies upon *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, 362 U.S. 330 (1960). However, this Court finds *Order of Railroad Telegraphers* to be inapposite. There, the Court held that the NLGA prevented the district court from enjoining a strike by the Order of Railroad Telegraphers. The Order of Railroad Telegraphers sought to force the carrier to negotiate an amendment to the contract to prevent the dismissal of any employees as a result of the carrier's consolidation of several stations. The case is not apposite, however, because the ICC was not involved and had not issued any final orders governing the consolidation. Indeed, the carrier was seeking approval from several state agencies. The Court stated: "Nothing the union requested would require the railroad to violate any valid law or the valid order of any public agency." *Id.* at 340. Here, on the other hand, MOPAC would be violating a material term of the ICC's approval of the trackage rights agreement if it took any action to require the use of MOPAC employees on KATY trains operating its trackage rights.

First, the *Texas & New Orleans Railway Co.* Court rejected the argument that the exemption power of the ICC exempted the NLGA. The Court held:

> This section [11341(a)] relieves the carriers of the restraints and limitations of other laws, but it does not, on its face, relieve them from the action of other parties, i.e., the union's economic threat of a strike. Further, Norris-LaGuardia could not be considered as a legal restraint or limitation on the carriers and their ability to carry out an approved transaction. It is directed not at the power of the carriers to do anything but to the power of the court to grant injunctive relief.

307 F.2d at 156. Second, the Court rejected the argument that the ICC's power to impose employee protective conditions under § 11347 of the ICA should be treated as an exception to the NLGA. The Court viewed such conditions as an imposition of duties on the carrier only and not as a prohibition against the union "from gaining further rights in the transaction through the use of its own economic power—the strike." 307 F.2d at 157. Finally, the Court rejected the argument that the NLGA must give way to the authority of the ICC to approve transactions, *Id.* at 159.

This Court disagrees with the result reached in *Texas & New Orleans Railway Co.* Although *Chicago & North Western Railway Co.* is not on point[10], it is the opinion of this Court that the underlying concern in *Chicago & North Western Railway Co.* warrants rejection of *Texas & New Orleans Railway Co.* In the *Chicago & North Western Railway Co.* case, the Court was concerned with the consequence of narrowly restricting the

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[10] There are two (2) problems with applying *Chicago & North Western Railway Co.* to this case. First, UTU's dispute is not covered by any of the arbitration provisions imposed by the ICC. *See N&W Conditions* Article 1, §§ 4, 11. *See also Finding of Fact No. 8.* Second, that case did not deal with the NLGA question. *Chicago & North Western Railway Co.* was a declaratory judgment action, rather than an action to obtain injunctive relief from a threatened strike. *See also Chicago & North Western Railway Co.*, 314 F.2d at 433.

scope of the ICC's power—labor unions could effectively block many or all consolidations which are approved by the ICC. The Harrington amendment was rejected to avoid such a consequence and, therefore, the Court interpreted the ICC's jurisdiction broadly to displace the applicability of the RLA. Similarly, it is the opinion of this Court that the applicability of the NLGA must be displaced by the power of the ICC over transactions like the one here, in order to avoid consequences which Congress intended to prevent.

The Supreme Court has stated that it will constrict the NLGA's broad prohibitions "in narrowly defined situations where accommodation of that Act to specific congressional policy is necessary." *Jacksonville Bulk Terminals v. Longshoremen,* ____U.S.____, Slip Op. at 17 (June 24, 1982). Congress gave the ICC exclusive and plenary authority to approve certain transactions which are in the public interest. In so doing, Congress specifically intended the ICC to authoritatively resolve labor disputes arising from rail consolidations "in order that economically desirable mergers not be obstructed." *International Assn. of Machinists and Aerospace Workers v. Northeast Airlines, Inc.,* 473 F.2d 549, 559n.15 (1st Cir. 1972). The legislative history of the ICA evidences this intent. *Id.* Moreover, as the ICC stated in its October 19, 1983, decision:

> If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, *our jurisdiction to approve transactions requiring changes of the working conditions of any employee would be substantially nullified.* Such a result would be clearly contrary to congressional intent.

F.D. No. 30,000 (Sub-No. 18) *et al.,* (October 19, 1983) (emphasis added). *See Finding of Fact No. 23.*

In the case at bar the ICC authoritatively resolved the question of which employees may operate KATY's trains over MOPAC lines. The NLGA must be accommodated to this exercise of the ICC's power, because allowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest.

Although it is not for this Court to question the wisdom of Congress' action, in this case it is not difficult to see why Congress intended the NLGA to be inapplicable to ICC-resolved, consolidation-related labor disputes. In the case at bar, UTU and other labor representatives participated in the ICC proceedings. *See Finding of Fact No. 6.* UTU does not contend that it did not have adequate opportunities to object to any provision of the transaction, including the trackage rights agreement, or to seek favorable treatment. UTU either failed to object to the crewing provisions of KATY's trackage rights application or it did object and the ICC rejected its objection.[11] In either case, it is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired.

Moreover, it is not probable that Congress intended to allow UTU to strike where UTU's objective is to obtain an advantage which MOPAC is now unable to give — the right to operate KATY trains that run over MOPAC lines. If MOPAC

[11] Here, according to the ICC, UTU did not specifically object to the crewing provisions of the trackage rights agreement at any time during the approval proceedings. F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983) at 8-12. *See Finding of Fact No. 23. See also supra*, note 4. UTU disputes this finding, but it matters not because the question of whether UTU objected to the crewing provisions of the trackage rights agreement is not material to this Court's resolution of the NLGA problem.

gave that right to any of its employees, MOPAC would breach its agreement with KATY and would vary a material term of an agreement approved by the ICC. If UTU obtained its objective by striking, wouldn't KATY employees then be free to strike to obtain the same advantage? To avoid the stifling effects that such economic power would have on any attempt to consolidate railroad operations, Congress vested the ICC with the authority to resolve such disputes during approval proceedings. Affected employees are not left out in the cold, because § 11347 requires the ICC to impose employee protective conditions. 49 U.S.C. § 11347. The balance and efficiency which Congress sought to achieve with this scheme would be essentially and materially frustrated if employees were free to strike.

This Court is aware that *dicta* in various Supreme Court decisions indicates that exceptions to the prohibitions of the NLGA will be found only where necessary to accommodate other Congressional objectives embodied in so-called "labor legislation". *Chicago River,* 353 U.S. at 42. The ICA was not enacted "as a part of a pattern of labor legislation," *id.,* but because the ICC has jurisdiction over labor disputes in connection with consolidation proceedings, excepting the NLGA in the case at bar does not result in a great departure from established doctrine. Indeed, the following passage from *Chicago River* can be read as supporting the result reached by this Court:

> We hold that *the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes.* There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved.

353 U.S. at 40 (emphasis added). Here, the NLGA must be accommodated to the ICA in order to preserve the obvious purpose of giving the ICC jurisdiction over railroad consolidation proceedings.

c. MOPAC HAS NOT VIOLATED SECTION 108 OF THE NORRIS-LaGUARDIA ACT

One final argument of UTU is that even if § 104 of the NLGA is inapplicable here, injunctive relief is still not appropriate because MOPAC violated § 108 of the NLGA. UTU contends that MOPAC violated § 108 by failing to negotiate with UTU or submitting this dispute to the National Mediation Board or to voluntary arbitration. *See generally, Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27 v. Toledo, Peoria & Western Railroad,* 321 U.S. 50 (1944).

UTU's argument must be rejected, however, because § 108 requires a complainant to "make every *reasonable* effort to settle" the dispute. 29 U.S.C. § 108 (emphasis added). In the case at bar the ICC conclusively determined that KATY may use its own employees on its own trains over MOPAC lines. Because the ICC conclusively determined the dispute in the case at bar, it would not be reasonable for MOPAC to negotiate, mediate or arbitrate with the UTU concerning the selection of forces to operate the trackage rights.

d. SUMMARY

In sum, this Court holds that the anti-injunction provisions of the NLGA do not deprive this Court of jurisdiction to enjoin UTU's threatened strike. Two (2) alternative rationales support this holding: first, this is a "minor" dispute within the meaning of the RLA; and second, even if this is "major" dispute within the meaning of the RLA, § 104 of the NLGA is displaced to preserve the purposes and objectives of the ICC's jurisdiction over labor disputes in consolidation proceedings. In addition, this Court holds that MOPAC did not violate § 108 of the NLGA.

3. PRELIMINARY INJUNCTION CRITERIA

In *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981), the Court identified the following four (4) factors which must be considered by a district court in passing on a motion for a preliminary injunction:

> (1) The threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Id. at 114. These four (4) criteria weigh in favor of granting preliminary injunctive relief against defendants' threatened strike.

First, it is clear that a strike by UTU against MOPAC is very likely to result in irreparable harm to MOPAC. *Finding of Fact No. 24.* UTU does not even attempt to contest this factor in its opposition to the motion.

On the second element, the balance between the threat of irreparable harm and the harm that will be inflicted on defendants if a preliminary injunction is granted, MOPAC suggests that the harm to UTU will be modest in view of two facts: 1) UTU has consented to a continuance of the temporary restraining order several times; and 2) the N&W Conditions provide UTU employees with adequate protection from the adverse effects of KATY employees operating the trackage rights. *See Findings of Fact Nos. 15, 8.* This Court agrees. The protective conditions provide adversely affected employees with displacement allowances, dismissal allowances and fringe benefits. Moreover, the trackage rights have been operated by KATY with KATY employees for over a year now. Any harm to UTU members has most likely already occurred. Any additional harm that might be caused by enjoining the threatened strike will not be irreparable.

The third factor, probability of success on the merits, is not a problem here. This Memorandum resolves UTU's primary defense, that this Court lacks jurisdiction to enjoin UTU's threatened strike, in favor of the carriers. *See supra.* Moreover, this Memorandum grants plaintiffs' motion for summary judgment on defendants' counterclaim, *see infra.* Therefore, success on the merits is likely.

Finally, the public interest in uninterrupted freight shipment weighs in favor of granting the motion. *See Finding of Fact No. 24.*

Accordingly, plaintiffs' motion for a preliminary injunction is granted.

II MOTION TO REFER ISSUES TO INTERSTATE COMMERCE COMMISSION

Prior to the October 19, 1983, decision of the ICC, *see Finding of Fact No. 23,* UTU moved to refer two (2) issues to the ICC pursuant to 28 U.S.C § 1336(b) and the doctrine of primary jurisdiction. *See United States v. Western Pacific Railroad Co.,* 353 U.S. 69, 63-65 (1956); *Iowa Beef Processors, Inc. v. Illinois Central Gulf Railroad Co.,* 685 F.2d 255 (8th Cir. 1982). UTU phrased these two (2) issues, as follows:

> 1. Did the ICC by its order in *Union Pacific—Control—Missouri Pacific; Western Pacific,* 366 I.C.C. 462 (1982), intend to exempt under 49 U.S.C. § 11341(a) the carriers involved in that transaction from the requirements of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, that they negotiate with rail labor those changes in rules and working conditions which may be required to implement the ICC's permissive authority?
>
> 2. Did the ICC by its order in *Union Pacific—Control—Missouri Pacific; Western Pacific,* 366 I.C.C. 462 (1982), require the Missouri Pacific Rail-

> road (MoPac) and the Missouri-Kansas-Texas Railroad (MKT) both to give advance notice to all MoPac and MKT employees who might be affected by the implementation of the Trackage Rights granted in Finance Docket No. 30,000 (Sub-No. 25) and, if requested, to negotiate an implementing agreement with those employees?

Motion of Defendants To Refer Issue To The Interstate Commerce Commission at 1-2. Following the ICC's October 19, 1983, decision UTU admits that its motion to refer is moot as to issue #1. However, it contends that its motion is not moot as to issue #2. Plaintiffs argue that the ICC's recent decisions also mooted the motion as to issue #2.

Essentially, this Court must decide whether the ICC's orders determined issue #2. UTU contends that the ICC's most recent order did not address the impact of Article 1, § 4 of the N&W Conditions, *see Finding of Fact No. 8,* and the right of UTU to require MOPAC to negotiate an implementing agreement with respect to the selection of forces problem. However, it is the opinion of this Court that the ICC's most recent decision makes it clear that the Article 1, § 4 requirement of notice and negotiation is inapplicable with respect to the selection of forces issue.

In its October 19, 1983, decision the ICC noted defendants' "notice and negotiation" argument, but rejected it. *See Findings of Fact Nos. 22, 23.* Moreover, the ICC held that UTU has *no* right to participate in the crew selection process and that MOPAC/KATY could implement their trackage rights agreement without *any* other approval. *Finding of Fact No. 23.* Finally, the ICC's discussion concerning the interpretation of labor conditions imposed in connection with an approved transaction, further suggests that Article 1, § 4 is not applicable to the crew selection issue:

> [S]tandard labor protection conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction. The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transaction.

F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983) at 6. Read in the context of the ICC's approval of the crew selection provisions of the trackage rights agreements, Article 1, § 4 is not applicable to that issue.[12] *See also Brotherhood of Maintenance of Way Employees v. Interstate Commerce Commission,* 698 F.2d 315, 317n.6 (7th Cir. 1983) ("The adoption of standard conditions, routinely imposed, often results in incorporation of superfluous provisions having no application to the particular case under consideration.")

Arguably, a portion of issue #2 was not decided by the ICC. The issue phrased by UTU is broad enough to cover the

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[12] Thus, as to plaintiffs' trackage rights agreement, the effect of the ICC's orders is that the following sentence is inapplicable:

> Each transaction which will result in a dismissal or displacement of employees or rearrangement of forces, shall provide for *the selection of forces* from all employees involved on basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4.

N&W Conditions, Article 1, § 4 (emphasis added). *See Findings of Fact Nos. 8, 17.*

question of whether plaintiffs have any duty under Article I, § 4 to give notice and negotiate an implementing agreement with respect to *issues other than the selection of forces. See Finding of Fact No. 17.* There is no need to refer this question to the ICC, however, because there does not seem to be any ambiguity about this question in the ICC's orders and because the central dispute between the parties, as evidenced by the positions of the parties taken in their memoranda, concerns the narrower question of plaintiffs' duty to negotiate about selection of forces.

Accordingly, UTU's motion is denied.

III CROSS-MOTIONS FOR SUMMARY JUDGMENT ON PLAINTIFFS' COMPLAINT

Under Rule 56 of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if he can "show that there is no genuine issue as to any material fact and that [he] is entitled to a judgment as a matter of law." *Fed.R.Civ.P.* 56(c). *See also Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464 (1962). In passing on a motion for summary judgment, a court is required to view the facts and inferences that may be derived therefrom in the light most favorable to the non-moving party. *Buller v. Buechler,* 706 F.2d 844, 846 (8th Cir. 1983); *Vette Co. v. Aetna Casualty and Surety Co.,* 612 F.2d 1076, 1077 (8th Cir. 1980). The burden of proof is on the moving party and a court should not grant a summary judgment motion unless it is convinced that there is no evidence to sustain a recovery under any circumstances. *Buller,* 706 F.2d at 846. However, under Rule 56(e), a party opposing a motion for summary judgment may not rest upon the allegations of his pleadings but "must set forth specific facts showing that there is a genuine issue for trial." *Fed.R.Civ.P.* 56(e). *See also* 10A Wright, Miller and Kane, *Federal Practice and Procedure: Civil 2d,* § 2739 (1983).

Plaintiffs moved for summary judgment on their complaint. Defendants filed a cross-motion for summary judgment. Plaintiffs argue that this is a "minor" dispute, that plaintiffs are exempt from the requirements of the RLA, and that this Court has jurisdiction to enjoin defendants' threatened strike. Defendants argue that this is a "major" dispute, that plaintiffs violated the RLA, and that sections 104 and 108 of the NLGA bar this Court from enjoining the strike.

It is obvious that this Memorandum determines several of the legal issues raised by the cross-motions for summary judgment. Moreover, neither party suggested that there are any genuine issues of material fact with respect to plaintiffs' complaint. Nevertheless, the summary judgment motions relating to plaintiffs' complaint will not be ruled upon at this time for the following reasons.

The parties, in their memoranda, utilize the "shotgun" method of argument. Accordingly, this Court found it difficult to answer each of the parties' contentions in a systematic and orderly fashion. The positions of the parties, especially UTU, seem to change with each response or reply to the prior memorandum. Moreover, the record in this case is remarkably inadequate and incomplete. In several instances the parties rely on documents that are not even in the file! This is not an adequate basis upon which to enter summary judgment on a claim for permanent injunctive relief.

The rulings of this Court on the legal questions related to the NLGA are not subject to further argument. Rather than rule on the parties' cross-motions for summary judgment at this time, however, it is the opinion of this Court that the parties should reevaluate their summary judgment positions in light of this Memorandum. The parties are also ordered to meet and confer for the purpose of: 1) attempting to settle this dispute or come to an understanding as to what, if any, legal or factual

issues remain undetermined; 2) stipulating to as many undisputed and necessary facts as possible; 3) organizing the complete documentary record in this case into a presentable form; and 4) determining whether any oral testimony will be necessary on any remaining issue, including the question of whether the preliminary injunction issued herein should be made permanent. The parties shall meet and accomplish these purposes within ten (10) days of the date of this Memorandum. The parties shall appear before this Court on Friday, March 16, 1984, at 10:00 a.m., to report on the results of their efforts. The trial of this case is reset for March 26, 1984.

IV. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIMS

Plaintiffs' motion for summary judgment on defendants' counterclaim presents a different situation. It can be determined solely by reference to the ICC's orders in this case and the arguments of the parties are more clear.

Count I of defendants' counterclaim alleges that MOPAC violated § 156 of the RLA by unilaterally changing the objective working conditions of its employees without following the procedures of § 156. This Court agrees with plaintiff, as discussed *supra*, that the ICC's actions exempt MOPAC from the requirements of the RLA. 49 U.S.C. § 11341(a). Accordingly, plaintiffs' motion is granted as to Count I of defendants' counterclaim and said count is dismissed.

Count II of defendants' counterclaim alleges that both MOPAC and KATY violated the orders of the ICC by failing to comply with the N&W Conditions, specifically Article 1, §§ 3 and 4, in connection with the use of KATY employees to operate the trackage rights. Again, as discussed *supra*, this Court agrees with plaintiffs that the ICC orders in question make it very clear that those sections of the N&W Conditions were not intended to apply to the crew selection provisions of the trackage rights agreements. To the extent UTU takes issue

with the actions of the ICC, this is not the proper forum for resolution of that issue. 28 U.S.C. §§ 2321(a), 2342. Accordingly, plaintiffs' motion is granted as to Count II of defendants' counterclaim to the extent that that count seeks to force plaintiffs to negotiate the selection of forces to perform the trackage rights authorized by the ICC.

However, Count II of defendants' counterclaim can be read as requesting this Court to order plaintiffs to comply with N&W Conditions, Article 1, § 4, with respect to *issues other than crew selection.* For example, there is no indication that the ICC made the first sentence of the second paragraph of Article 1, § 4, inapplicable to this transaction.[13] *Of supra,* note 13. It is clear that plaintiffs did not give the twenty (20) days notice required by Article 1, § 4. *See Finding of Fact No. 17.* It is also clear that KATY complied with Article 1, § 4 with respect to its own employees. *See Finding of Fact No. 21.* But the extent to which MOPAC so complied, with respect to its own employees, is not clear on this record. This may present a question of fact and, therefore, plaintiffs' motion is denied as to this aspect of Count II of defendants' counterclaim. The parties' conferences, pursuant to Part III of this Memorandum, shall address Count II of defendants' counterclaim.

/s/ JOHN F. NANGLE

UNITED STATES DISTRICT JUDGE

Dated: March 1, 1984

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[13] The first sentence of the second paragraph of Article 1, § 4, provides:

> At the request of either railroad or representatives of such interested employees, negotiations for the purpose of reaching agreement with respect to *application of the terms of conditions* of [these N&W Conditions] shall commence immediately and continue for not more than twenty (20) days from the date of notice.

N&W Conditions, Article 1, § 4 (emphasis added). *See Findings of Fact Nos. 8, 17.*

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MISSOURI PACIFIC RAILROAD COMPANY,

Plaintiff,

and

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Intervenor-Plaintiff,

C.A. No. 83-771-C(1)

vs.

UNITED TRANSPORTATION UNION, GENERAL COMMITTEE OF ADJUSTMENT, *et al.,*

Defendants.

[FILED March 30, 1984]

PERMANENT INJUNCTION

IT IS HEREBY ORDERED that defendants and each of them, and all classes of employees represented by defendants, their officers, representatives, agents, members, servants, employees, attorneys, and other persons in active concert or participation with them be and are hereby enjoined and restrained from engaging in the following actions as a result of the operation of Missouri-Kansas-Texas Railroad Company trains over Missouri Pacific Railroad Company tracks pursuant to the authorization of the Interstate Commerce Commission in Finance Docket No. 30,000 (Sub-No. 25):

1. threatening, calling, instigating, authorizing, encouraging, participating in, approving, or continuing any strike and/or concerted work stoppage or work slowdown against Missouri Pacific Railroad Company, and all acts in furtherance or in support thereof;

2. establishing and/or maintaining any picket or picket line on the premises on which the Missouri Pacific Railroad Company conducts its operations, including the entrances and any other places where said premises are situated; from interfering with ingress to or egress from said premises including the delivery, unloading, loading, dispatch and movement of rolling stock and equipment and the contents thereof, or from loitering or congregating at or near any approaches thereto, and upon any public street or highway leading to and from any place which the employees of the Missouri Pacific Railroad Company or those having business with the Missouri Pacific Railroad Company desire to enter or leave en route to or from said premises;

3. slowing down or interfering with the orderly and prompt continuance of work in Missouri Pacific Railroad Company's operations;

4. failing or refusing to report for work in accordance with the agreement between each individual defendant or class member and Missouri Pacific Railroad Company and in accordance with the labor agreement between the Union and the Missouri Pacific Railroad Company; and

5. carrying out or effectuating or conspiring to carry out or effectuate the activities enjoined in paragraphs 1, 2, 3, and 4 above.

IT IS FURTHER ORDERED that the said defendants, and each of them, and all classes of employees represented by defendants, including all agents, members, servants, employees, and attorneys, and other persons in active concert or participation with them take all affirmative steps within their power to prevent any picketing, strike, work slowdown or work stoppage, as fully described in paragraphs 1, 2, 3, and 4 above.

/s/ JOHN F. NANGLE
UNITED STATES DISTRICT JUDGE

Dated: March 30, 1984

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MISSOURI PACIFIC RAILROAD COMPANY

Plaintiff,

and

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Intervenor-Plaintiff,

C.A. No. 83-771-C(1)

vs.

UNITED TRANSPORTATION UNION, GENERAL COMMITTEE OF ADJUSTMENT, *et al.,*

Defendants.

[FILED March 30, 1984]

ORDER

Pursuant to the Memorandum filed herein this day,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the preliminary injunction entered by this Court on February 7, 1984, as justified by this Court's Memorandum of March 1, 1984, be and is made permanent, as modified, and judgment be and is entered in favor of plaintiff and intervenor-plaintiff on their complaints.

IT IS FURTHER ORDERED that, in accordance with the "Joint Statement" of the parties, those aspects of Count II of defendants' counterclaim which this Court's Memorandum of March 1, 1984, expressly refused to resolve be and are dismissed without prejudice. Plaintiff MOPAC also asks that judgment be entered in its favor on all other aspects of Count II of defendants' counterclaim. However, this is unneccessary in

view of the fact that this Court's Memorandum of March 1, 1984, partially granted plaintiffs' motion for summary judgment on Count II. *Memorandum of March 1, 1984* at 31-32.

IT IS FURTHER ORDERED that defendants' motion to strike certain language from the injunction be and is denied.

/s/ JOHN F. NANGLE
UNITED STATES DISTRICT JUDGE

Dated: March 30, 1984